Supreme Court, U.S.
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No. 94-1628

In The

Supreme Court of the United States

October Term, 1994

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, as Trustee of the MIAMI CENTER LIQUIDATING TRUST, and UNITED STATES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT SMITH

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QUESTION PRESENTED

Whether the court of appeals erred in affirming an order granting a motion to enforce a previously entered order of contempt where (a) Petitioner's prior appeals of the contempt order to the court of appeals and this Court were unsuccessful, and (b) there is no dispute that Petitioner diverted assets of the Miami Center Liquidating Trust to his personal use, disobeyed court orders to return the proceeds from his wrongful sale of those assets, and misrepresented to the courts the whereabouts of the sale proceeds?

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The opinions below include,

1. the unreported decision of the court of appeals in case no. 93-5042 affirming the district court's order granting the motion to enforce the contempt order (Pet. App. 1),

2. the unreported decision of the court of appeals in case no. 93-5042 denying rehearing and rehearing *en banc* (Pet. App. 3),

3. the unreported decision of the court of appeals in case no. 91-5741 affirming the district court's contempt order (Resp. App. 1),

4. the unreported decision of the court of appeals in case no. 91-5741 denying rehearing and rehearing *en banc* (Resp. App. 2), and order denying a stay (Resp. App. 4),

5. the district court's memorandum opinion and order of final judgment dated August 31, 1993 granting the motion to enforce the contempt order (Pet. App. 7),

6. the district court's order dated May 17, 1991 affirming the bankruptcy court's order of contempt (Pet. App. 28),

7. the district court's order dated June 25, 1991 denying a stay and rehearing (Pet. App. 38), and

8. the bankruptcy court's contempt order (Pet. App. 19).

STATEMENT OF JURISDICTION

This is Petitioner's second visit to this Court arising from the orders of contempt for his misappropriation of assets belonging to the Miami Center Liquidating Trust and for his misrepresentation of his disposition of those assets. Petitioner seeks review of the court of appeal's affirmance of an order of the district court granting the motion to enforce the contempt order, previously appealed unsuccessfully by Petitioner to this Court. Petitioner invokes 28 U.S.C. § 1254(1) to establish jurisdiction, but has failed to demonstrate any recognized basis for granting certiorari. He has not shown the existence of any conflict between any courts, nor the existence of an important question of federal law which has not been, but should be, settled by the Court. *See* Sup. Ct. Rule 10.1(a)-(c). The petition should thus be denied.

STATEMENT OF THE CASE

Introduction

Petitioner is one of five related debtors which he owns, controls and dominates.[1] Each filed simultaneous voluntary Chapter 11 petitions nearly eleven years ago in the United States Bankruptcy Court for the Southern District of Florida. *See Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1548 (11th Cir.), *cert.*

[1] The debtors are Theodore B. Gould, Holywell Corp., Miami Center Liquidating Partnership, Miami Center Corporation and Chopin Associates.

denied, 488 U.S. 823 (1988). This is Petitioner's thirteenth visit to this Court from the bankruptcy proceedings.[2]

After "overwhelming" approval by the creditors, on August 8, 1985 the bankruptcy court confirmed the plan of reorganization (hereinafter "Plan") proposed by the debtors' primary creditor, The Bank of New York, over the debtors' objections. *See Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The Plan provided for the creation of the Miami Center Liquidating Trust (hereinafter "Trust"), consisting of all of the debtors' combined assets under 11 U.S.C. § 541(a), and the appointment of a trustee. By order dated August 12, 1985, the court appointed Respondent Smith, who had no prior connection with the debtors or the bankruptcy proceedings. Bankr. C.P. No. 916.[3] Smith's authority to act became effective on October 10, 1985, the date the Plan was implemented.

The Plan substantively consolidated all of the debtors' assets, and directed Smith to sell the largest

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[2] In addition to this collateral attack on the confirmed plan of reorganization, Petitioner has unsuccessfully sought review in all but one of his prior visits to this Court. *See* Nos. 87-1988, *cert. denied*, 488 U.S. 823 (1988); 87-1989, *pet. for writ of mandamus denied*, 488 U.S. 814 (1988); No. 88-80, *cert. denied*, 488 U.S. 850 (1988); 89-864, *cert. denied*, 110 S.Ct. 867 (1990); 89-708, *cert. denied*, 110 S.Ct. 725 (1990); 89-917, *cert. denied*, 111 S.Ct. 767 (1991); 90-1551, *cert. denied*, 111 S.Ct. 2259 (1991); 90-761, *cert. denied* (January 18, 1991); *application for stay denied*, A-546 (January 17, 1991); 92-934, *cert. denied* (1993); No. 344 (October 30, 1992); *But see Holywell v. Smith*, 112 S.Ct. 1021 (1992).

[3] "Bankr. C.P. No. ___" refers to the court paper number assigned below.

asset, the Miami Center property, to The Bank of New York (hereinafter "Bank") for $255,600,000. The consideration took the form of cancellation of the Bank's claim (for approximately $242,000,000, including postpetition interest) plus cash. Following the debtors' failure to post a bond to stay implementation of the Plan, the sale of the Miami Center closed, and Smith commenced disbursement of allowed claims as directed by the Plan. *See* Bankr. C.P. No. 1086 and 1254 (First and Second Reports of the Liquidating Trustee, respectively).

Faced with the lack of a stay and the implementation and substantial consummation of the Plan, the debtors, including Petitioner, were *unsuccessful* in their appeal of the bankruptcy court's order confirming the Plan. *See Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), *dismissed as moot sub nom., Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).[4]

Course of Proceedings

Respondent Smith filed a motion to have Petitioner held in contempt for his unauthorized sale of Trust assets

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[4] Citing *In re Holywell Corp.*, 913 F.2d 873 (11th Cir. 1990), Petitioner falsely claims the Plan was reversed. Pet. at 3. A plain reading of that decision exposes his misrepresentation. He also falsely claims, without reference to any record evidence, that the Plan was confirmed without a hearing. Pet. at 12. The facts are otherwise. *See In re Holywell Corp.*, No. 84-01590 slip op. (Bankr. S.D. Fla. January 29, 1986), *aff'd*, 59 B.R. 34C (S.D. Fla. 1986), *dismissed as moot sub nom., Miami Center Ltd. Ptnshp. v. Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988).

and for his refusal to reveal the whereabouts of or to turn over the sale proceeds. Pet. App. 19.

The bankruptcy court found Petitioner to be in contempt, required him to disgorge sale proceeds of $67,500 (together with interest, less $1,000 in closing expenses) by a date and time certain, and imposed a fine of $1,000 a day until compliance if he failed to turn over the funds by the appointed time. The fine was payable to the court registry and was to continue until the order was obeyed. Pet. App. 24. Following Petitioner's failure to abide that order, the bankruptcy court certified to the district court that Petitioner was in contempt.[5]

The district court conducted a *de novo* hearing and entered an order finding Petitioner in contempt and, like the court below, required him to turn over the sale proceeds. He was given seven days to comply, and was advised that his failure to do so would "result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1,000" for each day until compliance. Pet. App. 28.[6]

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[5] Petitioner complains of bias and implies that the 1987 recusal of the bankruptcy judge assigned to this case has something to do with the issues on appeal. Pet. at 12. The bankruptcy judge who was recused had nothing to do with the contempt. That recusal was *years* before Petitioner misappropriated Trust assets and was held in contempt. He has never sought recusal of any of the judges presiding in this case since 1987.

[6] Petitioner falsely contends at p. 23 of his petition that this order did not provide for the daily fine to cease upon his compliance with the court's directive. *See* Pet. App. 28.

The district court denied rehearing and Petitioner's request for a stay, specifically rejecting the relevance of the issues ultimately decided in *Holywell Corp. v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992), to Petitioner's contumacious acts. Pet. App. 28.

The court of appeals affirmed *per curiam* without opinion, and denied rehearing, rehearing *en banc*, and a stay. Resp. App. 1. This Court summarily denied a stay, *Gould v. Smith*, No. 344 (Oct. 30, 1992), and denied certiorari. Resp. App. 17.

Thereafter, the district court granted the motion to enforce the contempt order, reducing the fines to a final judgment in favor of the Trustee for $66,500, plus interest from August 1, 1989; and in favor of the federal government for $1,331,000, plus interest from August 1, 1989 through March 24, 1993. The judgment in favor of the government represents the daily fine of $1,000 from the date Petitioner was ordered to comply through the district court's last hearing on the matter, when Petitioner first presented evidence of his inability to comply. The daily fine was suspended thereafter. Pet. App. 24.

Petitioner appealed unsuccessfully to the court of appeals, which held that his arguments were previously determined to be without merit and were thus barred, and that because he created his inability to comply with the district court's directive, the "inability to comply" defense was unavailable. Pet. App. 1. That court also denied rehearing and rehearing *en banc*. Pet. App. 3. The instant petition followed.

Facts

The facts relevant to the petition, although not in dispute, are not completely or accurately set forth in the petition.[7] In October 1981, Petitioner purchased certain concrete pumps and related equipment. Upon the filing of his Chapter 11 petition in 1985, the property became an asset of his bankruptcy estate pursuant to 11 U.S.C. § 541(a). Pursuant to the confirmed Plan, the concrete pumps and related equipment became property of the Miami Center Liquidating Trust on October 10, 1985, the effective date of the Plan. In 1989, Petitioner was contacted by a prospective purchaser of that property. Before the sale was consummated, Petitioner was notified that Respondent Smith claimed the right to this property and to any sale proceeds. Pet. App. 24, 28. He nonetheless sold the property without Smith's consent, accepted payment in his name alone, and allegedly placed the proceeds in a brokerage account which he refused to reveal. He insisted he was going to use the proceeds to satisfy taxes arising as a result of implementation of the Plan. *Id.* Pet. App. 7.

The bankruptcy court certified Petitioner to be in contempt. Despite having admitted that the property belonged to the Trust, Petitioner objected to the contempt order on the ground that Respondent Smith lacked any interest in the property. He also objected on grounds that the bankruptcy court lacked jurisdiction to appoint Respondent Smith as trustee, that the Plan did not bind

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[7] Petitioner's narrative is argumentative and replete with references to matters that are *dehors* the record, misleading, and irrelevant.

Petitioner because it was "unlawful," and that the bankruptcy court lacked jurisdiction after confirmation. Petitioner failed to raise any objection on the ground that the sanctions imposed were excessive.

At the *de novo* contempt hearing before the district court, Petitioner stated that he would rely on the court papers and that oral argument or an evidentiary hearing were unnecessary because "[t]his is a symbolic gesture. I want to take this up to the Eleventh Circuit." He also refused legal counsel. Resp. App. 9.

The district court held him in contempt, finding,

1. The concrete pumps and related equipment were assets of Petitioner's bankruptcy estate pursuant to Bankruptcy Code § 541(a), and thereafter became an asset of the Trust pursuant to the confirmed Plan.

2. Petitioner sold the property in question without authority and refused to disgorge the proceeds.

3. The bankruptcy court had jurisdiction to appoint Smith as Trustee, and that appointment and the establishment of the Trust were the law of the case.

4. The issue of the Trust's responsibility for taxes incurred as a result of implementation of the Plan was addressed in a separate proceeding and was irrelevant to the issue of the Petitioner's conduct.

Pet. App. 28.

The court ordered him to turn over the sale proceeds within seven days to Respondent Smith, imposed a $1,000

daily fine payable to the court registry in order to coerce compliance, and reserved authority to impose additional sanctions. Petitioner nonetheless refused to comply. *Id.*

Petitioner did not argue or offer evidence of an inability to comply at either contempt hearing. When Petitioner sought *rehearing* in the district court, he revealed for the first time that the sale proceeds were no longer in a brokerage account and would not be "saved" to pay taxes, as he had told the bankruptcy court. Pet. App. 38. He claimed he could not comply with the court's directive (and therefore should be relieved of any duty to do so) because he allegedly used the sale proceeds to pay his attorney in the related tax proceeding. *Id.* He failed to present any evidence to support this contention.

The district court denied rehearing and the request for a stay. *Id.* The court determined that the tax issue:

> lies outside the focus of the instant action and the May 17 Order of this Court. As we stated in our Order of May 17, 1991, '[t]he question of whether the trust must pay taxes is not relevant to the issue of ownership of the concrete pumps.' *Id.*, Order at 6. We did *not* premise our contempt order upon the bankruptcy court's 'agreement with the trustee that he is not responsible for the payment of federal income taxes.' [Petitioner's] Motion for Stay at 3. Nor did we hold that the bankruptcy court had so premised its certification of contempt. *Id.* Rather, we stated clearly and unambiguously that Appellant was to be held in contempt because 'Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating

> Trustee and in direct violation of a court order'. *See* Order of May 17, 1991 at 6.

Id.

The district court rejected Petitioner's reasoning in its entirety:

> Mr. Gould argues that if the Supreme Court reverses the Eleventh Circuit's determination that the Trust is not responsible for the claimed taxes, and if Mr. Gould then brings an action for breach of fiduciary duty against the Liquidating Trustee for not paying those taxes, and if Mr. Gould then obtains a judgment against the Liquidating Trustee, and if that judgment includes as damages Mr. Gould's attorney's fees in appealing the tax decision, then perhaps he could not be held in contempt for diverting trust proceeds and using the assets for his own purposes. Mr. Gould's argument is speculative and hypothetical. Moreover, even if he should prevail as to the tax matter, the underlying realities of the instant action remain the same: Mr. Gould sold a Trust asset, kept the proceeds, and took such action without the consent of the Liquidating Trustee and in direct violation of a court order. It is for these things that he was found in *civil* contempt of court and directed to comply. We have heard nothing new or different. . . .

Id.

The district court also rejected Petitioner's claim that he could not be held in contempt because he was unable to comply with the court's order, having allegedly used the money to pay his attorneys. The court noted his misrepresentations concerning the disposition of the sale proceeds, stating that his "representations conflict

directly with those he made in proceedings before the bankruptcy court. . . . " *Id.*

The court of appeals affirmed *per curiam*, citing only Rule 36-1 of the Rules of the United States Court of Appeals for the Eleventh Circuit. That rule provides the court may affirm an order without opinion when an opinion would have no precedential value and when, *inter alia*, the district court's judgment is based on findings of fact that are not clearly erroneous, is supported by the record, and has been entered without an error of law. *This Court denied certiorari.* Resp. App. 17.

The matter was thereafter remanded to the district court, which granted the Trustee's Amended Motion to Enforce Court's May 17, 1991 Order and to Enforce the Mandate. In that order, the district court held that Petitioner had the burden of proving his inability to pay the sums required by that court's May 17, 1991 Order, and permitted Petitioner to do so by producing (a) a current financial statement, (b) a schedule of all transfers of assets since June 2, 1989, the date when the monies were first due Respondent Smith, and (c) income tax returns from 1989 to 1993. The court noted that Petitioner voluntarily agreed to produce those documents, and ordered that he also appear for a deposition in aid of execution. In addition, the court ordered counsel for Respondent Smith to notify the United States Attorney of the proceedings. Lastly, the district court scheduled an evidentiary hearing on Petitioner's claimed inability to comply. Pet. App. 7.

On March 24, 1993, the district court conducted a hearing at which both Respondent Smith and Petitioner agreed that Petitioner had not complied with the court's

directives, and that at that time, he lacked assets with which to comply. The district court reaffirmed its prior finding from the June 25, 1991 Order:

> Gould argued that he could not comply with the Order to pay the Trustee since he had used the funds which he was required to turn over to the Trustee to pay the law firm of Arnold & Porter to appeal the tax obligation issue. The June 25, 1991 Order observed that this representation appeared to conflict directly with those representations made before the bankruptcy court at which time Gould stated that he had invested the proceeds in commercial paper.[1]

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[1] At the July 27, 1989 hearing before the Bankruptcy Court, counsel for the Liquidating Trustee read Mr. Gould's deposition testimony into the record, and Mr. Gould then adopted those statements in open court:

> Q. Did you receive the proceeds in the form of a cashiers check for $67,500, payable to you only?
>
> A. Yes.
>
> Q. Did you keep the proceeds?
>
> Page 10:
>
> A. The proceeds have been invested.
>
> Q. Where is the $67,500 less the thousand dollars [at] present?
>
> A. Invested in GMAC 30 day paper at 9.21 percent interest.
>
> Q. In whose name is the account held?
>
> A. In my name.

* * *

> THE COURT: Do you find any fault with Mr. Stettin's presentation?
>
> MR. GOULD: No, just to the extent that it's necessary to attribute – to characterize these funds as being taxable income of my bankruptcy estate.
>
> MR. STETTIN: I don't think that is necessary for the determination that I wish the Court to make. I will say it's property of his estate and therefore belongs to the liquidating trust.
>
> THE COURT: Do you have any problem with that?
>
> MR. GOULD: No.

Tr. of Hearing, at 63, 78-69 (July 27, 1989).

Pet. App. 10.

Respondent Smith sought to enforce the civil contempt fine by reducing it to a money judgment, and asked the district court to reserve jurisdiction to consider incarceration as punishment for the misrepresentation Petitioner made as to what he did with the proceeds (criminal contempt). Petitioner argued that the court should vacate the contempt order because by divesting himself of the proceeds, he could no longer comply with the order.

The district court held:

> The precise issue presented is whether Gould has purged himself of contempt by virtue of his inability to comply with this Court's Order of contempt. Inability to comply with an order is ordinarily a complete defense to contempt proceedings. *See United States v. Rylander,*

460 U.S. 752, 757, 103 S.Ct. 1548, 1552 (1983); *Newman v. Graddick*, 740 F.2d 1513, 1528 (11th Cir. 1984). The defense is unavailable, however, where the contemnor created his own inability. *See Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510, 1521 (11th Cir. 1986); *Phoenix Marine Enterprises, Inc. v. One Hylas 46' Convertible Sportfisherman Hull #1*, 681 F.Supp. 1513, 1530 (S.D. Fla. 1988), *aff'd*, 846 F.2d 753 (11th Cir. 1988); *Piambino v. Bestline Products, Inc.*, 645 F.Supp. 1210, 1215 (S.D. Fla. 1986).

Here Gould created his own inability to comply by using the proceeds from the sale of the concrete pumps to pay the law firm of Arnold & Porter for the prosecution of the appeal of an unrelated issue in the bankruptcy case. On more than one occasion, Gould himself represented to this Court that he used the funds to pay Arnold & Porter. *See, e.g.*, Tr. of Hearing at 43 (March 24, 1993). Furthermore, Gould himself offered the affidavit of one Edgar Schumacher, Jr., the 'informal tax CPA for Theodore B. Gould and his wife Helen,' who swore under oath that:

> The net sale proceeds from the sale of the concrete pumps were deposited by Mr. Gould in his business checking account at Crestar bank and were subsequently paid out to retain and pay initial Arnold & Porter legal fees incurred in taing [sic] the income tax case into the United States Supreme Court.

Schumaker [sic] Aff. at ¶¶ 2, 7.

We find that at present, Gould is unable to pay and thereby purge himself of civil contempt. Therefore further amassing of the $1000 per day fine is

unavailing and no longer coercive. Thus, the running of the daily fine should be terminated, and the outstanding balance reduced to a judgment which the United States can execute upon should Gould ever acquire reachable assets.

There being no real dispute that Gould himself created his inability to deliver the proceeds from the sale of the concrete pumps to the Trustee pursuant to the valid Orders of the Bankruptcy Court and this Court, we cannot find cause to reward his conduct by vacating the formal order of contempt. Although the sanction that accompanies a finding of civil contempt usually takes the form of incarceration or a fine, several courts have issued civil contempt orders "standing alone." *See, e.g., Hecht v. Don Mowry Flexo Parts, Inc.*, 111 F.R.D. 6 (N.D. Ill. 1986) (adjudging civil defendant in contempt for failure to comply with a trial subpoena duces tecum, but declining to impose any sanctions at all since the trial was over and since plaintiff had not shown that he suffered any monetary damages); *United States v. Professional Air Traffic Controllers*, 678 F.2d 1, 5 (1st Cir. 1982) (holding that a 'bare finding of civil contempt may stand'). While Mr. Gould is unable to comply, the sanction of a fine or incarceration can no longer be said to be coercive and any further sanction as a means of coercing compliance with the Court Orders would be ineffectual and therefore would be purely punitive in nature. *On this record, however, we cannot find that Mr. Gould has purged himself of civil contempt.*

The Trustee has moved this Court to consider the commencement of criminal contempt proceedings as a sanction for Gould's willful

noncompliance. We decline the Trustee's invitation to proceed *sua sponte* with criminal contempt proceedings. To the extent that criminal contempt proceedings may be appropriate, the matter should be presented to the United States Attorney for the Southern District of Florida for whatever review or inquiry he may deem appropriate.[3]

---

3 The Trustee has suggested that a charge of criminal contempt is amply supported by the record. For example, the Schumacher Affidavit submitted by Gould indicates not only that the proceeds were ultimately used to pay Arnold & Porter, but also that the proceeds were deposited by Gould "into his business checking account." Schumaker [sic] Aff. at ¶ 7. This appears to conflict directly with Gould's representation to the Bankruptcy Court that the proceeds were invested into commercial paper. Tr. at 63, 68 (July 27, 1989). Aside from this discrepancy in Gould's sworn statements, the record indicates his firm intention to flout the valid order of the Bankruptcy Court to turn over the proceeds of the concrete pump sales. *See supra*, note 2. Even accepting – solely for the sake of argument – Gould's representation that he invested the proceeds in commercial paper, a searching review of the transcript of the hearing held by Judge Weaver reveals no representation by Gould that he planned to redeem the instrument and *expend* the very funds at issue in order to appeal the income tax liability question the resolution of which he stated he would await before complying with Judge Weaver's Order. (emphasis supplied).

The court of appeals affirmed, holding Petitioner's arguments were previously found to be without merit and were thus barred, and that because he created an

inability to comply with the court's directive, the "inability to comply" defense was unavailable. Pet. App. 1. The instant petition followed.

SUMMARY OF ARGUMENT

Gould argues that the $1,000 daily fine until compliance, which was ultimately terminated and reduced to a judgment in favor of the federal government, is a "punitive sanction in violation of the procedural due process requirements of due process of law applicable to allegations of criminal contempt." Pet. at 19. *Res judicata* and collateral estoppel bar this argument. Moreover, the sanctions imposed were for civil, and not criminal, contempt and were lawful.

Petitioner has failed to state a legally cognizant reason for granting the writ. It is well established that one may not evade a finding of contempt by willfully rendering oneself unable to comply with a valid court order, especially after entry of the order. Further, the final judgment does not in any way violate the Excessive Fines Clause or the Due Process Clause of the United States Constitution. The judgment in favor of Respondent Smith is directly related to Smith's actual losses arising from Petitioner's misappropriation of Trust assets. The $1,000 daily fine was imposed for the express purpose of compelling compliance with the lower court's orders to turn over the sale proceeds, and was suspended upon the presentation of *evidence* that Petitioner was no longer able to comply. Petitioner cites no authority to support his argument that the fine should have been vacated *nunc pro*

tunc because he made himself unable to comply or because his debt to the Trustee was ultimately set-off in a later proceeding on a different issue. There can be no violation of constitutional rights under these circumstances.

For these reasons, the Court should deny the writ.

ARGUMENT

I.

RES JUDICATA AND COLLATERAL ESTOPPEL BAR THE ISSUES RAISED ON APPEAL

All of Petitioner's arguments were raised and rejected in his original appeal of the contempt order. Resp. App. 1, 17, 18 and 62. *Res judicata* and collateral estoppel, therefore, bar relitigation.

A judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in the first action. *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981); *Allen v. McCurry*, 449 U.S. 90, 95, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980); *In re St. Laurent*, 991 F.2d 672, 675 (11th Cir. 1993). Pursuant to *res judicata*, "the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial." *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 632 (11th Cir. 1984), *quoting Kasper Wire Works, Inc. v. Leco Engineering & Machinery*, 575 F.2d 530, 535 (5th Cir. 1978).

"The doctrine of *res judicata* is premised on the principle of judicial finality, precluding relitigation of a claim after the same parties have had a reasonable opportunity to litigate that claim before a court of competent jurisdiction, and a final decision concerning the claim has been reached." *Hann v. Carson*, 462 F.Supp. 854, 860 (M.D. Fla. 1978), *citing Kasper Wire Works*, 575 F.2d at 537-38; *Stevenson v. Int'l Paper Co.*, 516 F.2d 103, 109 (5th Cir. 1975). *See also Allen*, 449 U.S. at 95, 101 S.Ct. at 415; *St. Laurent*, 991 F.2d at 675.

Here, there is no question that the parties and the issues in this appeal are identical to the parties and issues in Petitioner's prior appeal. For example, in Petitioner's first appeal to the court of appeals, No. 91-5741, and in his petition for writ of certiorari therefrom, he argued that the contempt orders of the bankruptcy court and district court violated his due process rights. Resp. App. 18 and 62. In this appeal, Petitioner argues the same thing. Pet. at 19 *et seq*. Even if he failed to raise any of the issues below, the principles of *res judicata* and collateral estoppel preclude his doing so now.

As Petitioner's arguments and the issues herein are the same as those raised and rejected in *Gould v. Smith*, No. 91-5741 slip op. (11th Cir. July 6, 1992), *cert. denied*, No. 92-934 (1993), the writ should be denied.

II.

THE CIVIL CONTEMPT FINE PAYABLE TO THE UNITED STATES OF AMERICA, IMPOSED TO COERCE PETITIONER INTO COMPLIANCE, IS APPROPRIATE AND IN CONFORMITY WITH THE LAW

In the event the Court does not deem Petitioner's arguments barred by the doctrines of *res judicata* or collateral estoppel, the appeal is nonetheless without merit.

Petitioner misreads controlling case law concerning the propriety of the sanctions imposed. The district court's imposition of sanctions is consistent with controlling law, and is a proper exercise of its power to coerce compliance with court orders and to punish contumacious conduct.

"Civil contempt sanctions may be imposed for either or both of two distinct purposes, to coerce compliance with a court order, and to compensate the complainant for actual losses sustained . . . . as a result of the defendant's contumacy." *See United States v. United Mine Workers of America*, 330 U.S. 258 (1947); *Granfinanciera, S.A. v. Nordberg (In re Chase & Sanborn Corp.)*, 872 F.2d 397, 400-401 (11th Cir. 1988). If the purpose of the fine is solely to compensate the complainant, it is payable to the complainant and must be based on proof of the complainant's actual loss. *Id.*

The rules are different when the fine is coercive. "If the fine is coercive it is to be paid into the court registry, not to the complainant. In this instance the court must

consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any sanction bringing about the result desired." *United Mine Workers*, 330 U.S. at 304. A coercive fine does *not* have to be based on the complainant's actual losses, nor does it require a showing of Petitioner's ability to pay.

The district court's *de novo* imposition of sanctions in this case fully complies with the applicable guidelines. The district court ordered Gould to comply with the bankruptcy court's order directing him to turn over to Respondent Smith the net sale proceeds. The court gave him seven days to comply, and stated that his failure to do so "shall result in the imposition of sanctions including, but not limited to, a daily fine in the amount of $1,000 per day for each day Mr. Gould may fail to comply." By suspending the fine upon Petitioner's presentation of evidence that he could not comply, and by reducing to a final judgment the total amount of the daily fine incurred upon the presentation of that evidence, the district court did not, contrary to Petitioner's argument, convert the matter from a civil to a criminal contempt. Petitioner's argument entirely ignores the fact that until Petitioner introduced evidence of using the sale proceeds to pay his lawyers in another case, he had represented that he held the funds in his name in a brokerage account. Accordingly, there can be no question that the daily fine was coercive and thus civil in nature.

The bankruptcy court's order which the district court commanded him to obey provided that the daily $1,000 fine until compliance was payable to the court registry, and that the fine was a "reasonable and necessary means

of enforcing this Order, given the persistent and deliberate refusal of the Defendant Theodore B. Gould to obey the Order of this Court and the frustration of the Liquidating Trustee's ability to perform his functions as Trustee." The bankruptcy court further noted Petitioner's statement to the court that he would not obey a direct court order to turn over the sale proceeds. At that time, Petitioner had represented that he was holding the funds in a brokerage account. Thus, it was entirely reasonable for the court to impose a daily fine to compel compliance because Petitioner had the means to comply. This remained true at the time the district court entered its contempt order (the May 17, 1991 Order).

In his effort to avoid the consequences of his actions, Petitioner complains his constitutional rights have been violated because (1) the $1,000 daily fine grew into a large sum, (2) he cannot afford to return the sale proceeds or pay the fine, and (3) his obligation to the Trustee for the $66,500 was satisfied by the set-off provision of a *1994* order awarding him reimbursement of accounting expenses. Each excuse is without merit.

In considering the amount of sanctions, it is irrelevant that the total dollar figure payable to the court registry had risen by $1,000 a day since August 1989, when the bankruptcy court entered its order of contempt, or since May 1991, when the district court affirmed and entered a *de novo* order of contempt. Petitioner had the power to prevent the imposition of any sanctions by turning over the monies he misappropriated. He brought the problem on himself, and did so at his peril.

None of the facts stated above are in dispute. These facts demonstrate that Petitioner's first contempt – the misappropriation of Trust assets – was an indirect contempt. That is, it was committed outside the presence of the court. It is by itself nonetheless a contempt. *See Wolfe v. Coleman*, 681 F.2d 1302 (11th Cir. 1982). His second contempt was the deliberate refusal to comply with both the bankruptcy and district courts' commands to turn over the proceeds from the unauthorized sale of Trust property. The violation of a court order is plainly a contempt, regardless of whether the violation was deliberate (which it was in this case) and regardless of whether the orders were valid (which they were). *See Maness v. Meyers*, 419 U.S. 449 (1984); *Lindsey v. Ipack*, 732 F.2d 619 (8th Cir. 1984). The third contumacious act was his misrepresentation as to the disposition of the sale proceeds. That contempt may stand alone. *See Hecht v. Don Mowry Flexo Parts, Inc.*, 111 F.R.D. 6 (N.D. Ill. 1986); *United States v. Professional Air Traffic Controllers*, 678 F.2d 1 (1st Cir. 1982).

Petitioner's deliberate disregard of the Plan, of court orders and of the judicial process entirely justifies the finding of contempt. *See Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1447 (11th Cir. 1985) ("It is beyond peradventure that all federal courts have the power . . . . to impose sanctions against recalcitrant . . . parties litigant").

A. Self-Created Inability To Comply Is No Defense To Contempt

Petitioner's belated defense that the fine should have been vacated altogether because he is unable to comply

with the lower courts' orders[8] because he used the wrongfully obtained proceeds from the sale of the concrete pumps to pay his attorneys in an appeal from another bankruptcy court order is legally deficient. While a party held in contempt may defend his failure to obey court orders on the ground that he is unable to comply, *Pesaplastic, C.A. v. Cincinnati Milacron Co.*, 799 F.2d 1510 (11th Cir. 1986), he must demonstrate that he has "done [his] utmost to comply with the court's orders to establish [his] inability to comply." *Phoenix Marine Enterprises, Inc. v. One (1) Hylas 46' Convertible Sportfisherman Hull No. 1*, 681 F.Supp. 1523 (S.D. Fla.), *aff'd*, 846 F.2d 753 (11th Cir. 1988). The defense of inability to comply with a court order is measured **at the time of the contempt proceeding.** *See Piambino v. Bestline Products, Inc.*, 645 F.Supp. 1210 (S.D. Fla. 1986). Petitioner rendered himself unable to comply much later. More importantly, inability to comply does not preclude a finding of contempt "when the alleged contemnor has created the inability himself." *Id.*

An in-court refusal to comply with a court order, as was the case here, constitutes an affront to the court, and summary contempt would have been appropriate. *Matter of Jackson*, 770 F.2d 1550 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986).

In a creative effort to justify his unauthorized taking of Trust assets, Petitioner argues that the contempt order should have been vacated *nunc pro tunc* rather than reduced to a final judgment because he used the money

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[8] This defense was not raised until *after* the district court's *de novo* contempt order.

to pay what he claims are administrative expenses of the Trust. Such a claim is entirely without merit.

Petitioner belatedly admitted that he used the proceeds from the sale of the concrete pumps to pay the law firm of Arnold & Porter to represent him successfully in *Holywell Corp. v. Smith*, 503 U.S. 47, 112 S.Ct. 1021, 117 L.Ed.2d 196 (1992) (the "tax case"). He justifies his actions by claiming that Arnold & Porter's fees were an administrative expense of the Trust.

The bankruptcy court, however, denied Arnold & Porter's fee application. Pet. App. 66.[9] The fee application covered not only representation in the tax case of Petitioner and his four co-debtors, but representation in two other unrelated matters. Further, the fee application was not filed until January 5, 1994, nearly five years *after* Petitioner diverted the Trust assets at issue. Accordingly, Petitioner's defense of having used the funds for an "administrative expense" of the Trust is meritless.

B. The Tax Decision Is Irrelevant

Petitioner relies on the tax case to support his claim that the Plan does not bind him and that confirmation of the Plan was unlawful. Using Petitioner's logic, his misappropriation of Trust assets and his misrepresentations as to the disposition of those assets was justified because he prevailed in the tax case. His logic, if it can be called that, is not supported by the law or the facts of this case.

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[9] Both Arnold and Porter and the debtors have filed notices of appeal. Bankruptcy Court C.P. 2580 and 2584.

In the tax case, this Court ruled that the Trust is statutorily responsible for the tax consequences of the Plan even though the Plan failed to provide for payment of such taxes. *Id.* The Court determined that the Plan was not binding on the tax authorities government because 26 U.S.C. § 6012(b) imposed on the Trust an independent tax obligation. As the lower court noted, the tax issue has nothing to do with the contempt proceeding. Pet. App. 7, 28.

Respondent Smith agrees that the failure of the Plan to address tax consequences is a flaw which might have prevented confirmation had such an objection been properly raised.[10] In 1987, Smith filed an adversary complaint seeking a determination of the Trust's tax obligations. He included in that complaint a claim against The Bank of New York as the proponent of the Plan, in the event the Trust was held responsible for the payment of taxes. Petitioner neglects to state that in proceedings on remand from this Court's tax decision Respondent Smith obtained a judgment against The Bank of New York for negligent misrepresentation and indemnification with respect to the tax issues,[11] *and that Respondent Smith has settled all of his outstanding tax obligations.* Petitioner also neglects to mention that the bankruptcy court and the district court have rejected his counterclaims against the Respondent Smith (both individually and as Trustee) for gross negligence,

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[10] Respondent Smith was a stranger to the bankruptcy proceedings prior to confirmation of the Plan.

[11] *See Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993). The Trustee and the bank have since reached a compromise which has been approved by the bankruptcy court.

breach of fiduciary duty and conspiracy regarding the tax issues. *See Holywell Corp. v. Smith*, No. 87-0627 slip op. (Bankr. S.D. Fla. September 30, 1993), *aff'd*, No. 94-0111 slip op. (S.D. Fla. January 20, 1995), *appeal filed*, No. 94-4818 (11th Cir.).

Regardless of the facts, Petitioner entirely fails to demonstrate how the tax case is relevant, let alone a defense, to the contempt proceedings. The end does not justify the means.

C. The Set-Off Provision Of The 1994 Order Awarding Petitioner Reimbursement Of Accounting Expenses Does Not Affect The Final Judgment In Favor Of The United States

There is no legally cognizable argument to explain how the set-off feature of the order awarding Petitioner accounting expenses would vacate the final judgment in favor of the United States.

That order, entered in 1994, awarded Petitioner $70,000 in accounting expenses (on a claim of $1.8 million) and set-off that sum against the $66,500, plus interest, Petitioner owed the Trust under the original contempt orders dating back to 1989 and 1991.

The entirely separate final judgment in favor of the United States was entered in 1993 as a result of the district court's determination that a further coercive fine would serve no purpose. That judgment is a debt Petitioner owes to the federal government and not to Respondent Smith. Whatever set-off there is between the debt

Petitioner owes Respondent Smith is irrelevant to the debt he owes the government.

There is simply no logic to Petitioner's argument that the set-off provision of the accounting fee order vacated *nunc pro tunc* the final judgment. The accounting fee order was not entered until a year after entry of the district court's judgment in favor of the United States. If a contemnor can ignore a valid court order to turn over misappropriated monies, incur a debt resulting from his disobeyal of that order, and then avoid that fine *altogether* by belatedly satisfying the underlying debt, the court's authority to enforce its orders is rendered impotent. Sanctions are the coercion used against recalcitrant parties. *See United Mine Workers, supra; Carlucci, supra.* If Petitioner is correct, then the power to enforce orders disappears. He is not correct. The final judgment in favor of the United States was not vacated and it remains an obligation of Petitioner.

CONCLUSION

For all of the reasons set forth herein, the writ should be denied.

Respectfully submitted,

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Counsel for Respondent Smith

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5741

D.C. Docket No. 89-2629-CIV-SM
D.C. Docket No. 84-1590-94-SMW

IN RE: HOLYWELL CORPORATION,

Debtor.

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(July 6, 1992)

Before BIRCH, Circuit Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. R. 36-1.

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* *See* Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5741

IN RE: HOLYWELL CORPORATION,

Debtor.

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Filed Sept. 3, 1992)

Before: BIRCH, Judge, JOHNSON* and BOWNES**, Senior Circuit Judges.

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* See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

** Honorable Hugh H. Bownes, Senior U.S. Circuit Judge for the First Circuit, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-5741

IN RE: HOLYWELL CORPORATION,

Debtor.

THEODORE B. GOULD,

Plaintiff-Appellant,

versus

FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust, BANK OF NEW YORK,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

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(Filed Oct. 15, 1992)

ORDER:

(X) The motion of *Appellant*, for ( ) stay (XX) recall and stay issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of *Appellant*, for (XX) stay ( ) recall and stay of the mandate pending petition for writ of

certiorari is GRANTED to and including ___, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period mentioned above there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of ___ for a further stay of the issuance of the mandate is GRANTED to and including _____ under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of ___ for a further stay of the issuance of the mandate is DENIED.

/s/ Illegible
UNITED STATES
CIRCUIT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: HOLYWELL CORPORATION, et al., Debtors,	CASE NO. 89-2629-CIV-MARCUS
THEODORE B. GOULD, Appellant, vs. FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust, Appellee.	

Miami, Florida
October 29, 1990
9:28 a.m.

APPEARANCES:

HERBERT STETTIN, ESQ.
AmeriFirst Building - Suite 2215
One S.E. 3rd Avenue
Miami, Florida 33131
Appearing on behalf of the Appellee

BARRY R. DAVIDSON, ESQ.
3200 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131-2312

Appearing on behalf of the Bank of New York

THEODORE B. GOULD
2568-D Ivy Road
Charlottesville, Virginia 22901
Appearing pro se

REPORTER: ROBERT A. RYCKOFF
301 North Miami Avenue – Fifth Floor
Miami, Florida 33128

[p. 2] (Call to order of the Court.)

THE COURT: Let me call in Re: Holywell Corporation, 89-2629.

Good morning, folks, and how are you?

This is In Re: Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates, and Theodore B. Gould, debtors.

And I wanted to bring everyone in to see where we stood and what kind of timing made sense for the purposes of scheduling this cause.

As I understand it, the issue is the liquidating trustee is requesting a hearing on the Bankruptcy Court's order of August 14th where there was a certification of contempt against Mr. Gould.

So let me begin. If you folks would be kind enough to state your appearances.

MR. STETTIN: I am Herbert Stettin and I am representing Fred Stanton Smith, who is the trustee of the Miami Center Liquidating Trust.

THE COURT: Good morning to you, sir.

MR. STETTIN: Good morning.

THE COURT: And other counsel.

MR. DAVIDSON: I am Barry Davidson, Judge. I represent Bank of New York.

MR. GOULD: I am Theodore B. Gould and I represent [p. 3] myself.

THE COURT: All right. Where do we stand on the case, folks?

MR. STETTIN: Your Honor, the Bankruptcy Court entered an order finding Mr. Gould in contempt, as you pointed out, dated August 1, 1989.

Thereafter there was an order certifying Mr. Gould to be in contempt, dated August 14th.

And the reason for the two is because the August 1 order gave him a time within which he could purge himself of the contempt. He declined to do so. The Court found that he had failed to do so and said that he should be certified up to this court to be held in contempt as recommended.

The contempt is a fairly basic one and I do not believe that there is a dispute as to the underlying facts.

Mr. Gould, I am sure, is going to be arguing the law that he considers applicable. We respectfully disagree. We are not going to be, in my opinion, relitigating the underlying factual basis.

THE COURT: So how would you have me proceed, Mr. Stettin?

MR. STETTIN: I think that the order is self-explanatory. There is no dispute as to the facts. Mr. Gould, it seems to me, has the burden of showing why he [p. 4] should not be held in contempt by this Court.

THE COURT: Mr. Gould.

MR. GOULD: I have filed objections under Rule 9033 to the order certifying contempt. I don't think that it's necessary to do anything more than have the Court – have Mr. Stettin respond to my objections and give me the opportunity to file a reply brief at that point. As far as I am concerned the Court –

THE COURT: To be disposed of on the papers?

MR. GOULD: Yes.

THE COURT: Do we need argument on it?

MR. GOULD: No. This is a symbolic gesture. I want to take this up to the Eleventh Circuit.

THE COURT: Have you considered the wisdom of retaining a lawyer to represent you?

MR. GOULD: It isn't necessary, Your Honor.

THE COURT: It may not be, but I will ask you whether you –

MR. GOULD: I don't –

THE COURT: Have you considered the wisdom of retaining –

MR. GOULD: I have the issues here.

THE COURT: I raise the issue because I always do when a party proceeds pro se, especially when the issues concern contempt.

[p. 5] MR. STETTIN: You would not be familiar with much of the history of this case, Judge, because you have been fortunate that – as my memory tells me – this is the only one of these that you have ever had on the merits. Every one of the other district courts – district court judges in this district, almost without exception, and some two, three and four times, have had the good fortune to have to deal with parts of this case. This is approximately the 82nd or 83rd separate appellate proceeding to emanate from this case.

The Eleventh Circuit has recently ruled in several of these appeals, and I think what Mr. Gould means when he says that this is symbolic is that those rulings have been adverse, particularly what we call the income tax rulings, and I have got a copy of that opinion, which I was going to leave you anyway. It came out in the last 30 days or so.

THE COURT: In any event, you have considered the wisdom of retaining an attorney and do not wish to do so?

MR. GOULD: Yes, I have. I do not wish to.

THE COURT: All right. Mr. Stettin, he says he has filed his designation of objections and is seeking a response from you.

MR. STETTIN: He has filed objections to the order of contempt and I have no objection to responding in writing.

[p. 6] I will tell the Court that I think you can handle the matter orally as well as you can in writing, Judge. It has been done so many times before.

THE COURT: There is nothing new or different.

How long will it take you – and I will give you whatever time you need – I don't want to put you to any extra work but –

MR. STETTIN: Written response or oral response?

THE COURT: Just a written –

MR. STETTIN: Just a –

THE COURT: Because he said he would want to reply to that anyway, and so just so the record is complete, you can tell me what time frame makes sense for you.

MR. STETTIN: Ten days is fine.

THE COURT: All right. We will give you ten days to file a response to – actually all he has really done is designate the record, but I take it we should –

MR. STETTIN: I do have a document called objections to order of contempt.

MR. GOULD: I filed objections to it.

THE COURT: Then I haven't seen that. When did you file that?

MR. STETTIN: I will tell you the date it was filed. That may help you. It is dated August 10, 1889.

It's possible, Judge, that the clerk of the [p. 7] Bankruptcy Court did not include that.

THE COURT: We have the objections to the order of contempt filed by – that's what you are referring to?

MR. STETTIN: Yes, sir.

THE COURT: And that was submitted pro se by Mr. Gould.

MR. STETTIN: And we did file a response to objections to order of contempt and that was done on about August 21, 1989.

THE COURT: Is there anything further – maybe I am missing something, Mr. Gould. What else is there?

MR. STETTIN: There is not.

The only thing that has come up is a copy of the Eleventh Circuit's opinion on the tax question, which was still open at the time these pleadings were filed. With the Court's permission, I will give it to your clerk.

THE COURT: Sure.

Mr. Gould, let me just sharpen the question then – has he responded or –

MR. GOULD: I am not aware of any response to the objections because I haven't received it.

MR. STETTIN: (Handing to Mr. Gould.)

MR. GOULD: Oh, yes, he has. I am sorry.

THE COURT: Did you want an opportunity to file a response –

[p. 8] MR. GOULD: I guess I would like an opportunity to reply to this, particularly in view of the Eleventh Circuit's –

THE COURT: How much time do you want?

MR. GOULD: Ten days is fine.

THE COURT: All right. We will give you ten days from today to file a reply to his response.

I take it that will do it and we can resolve it on paper and there is nothing further we need do, from everyone's perspective?

MR. STETTIN: Yes.

MR. GOULD: That's correct.

THE COURT: Mr. Davidson.

MR. DAVIDSON: Yes, sir. I would agree. I follow Mr. Stettin's lead.

I am not sure that brief oral argument wouldn't be helpful to –

MR. STETTIN: There is no such thing as brief oral argument in this case, but if you – and I do think oral argument would be useful, but it –

THE COURT: I leave it to counsel. If you want me to set if [sic] for oral argument, I will set it. If you want to rely on the papers, I am happy to proceed by the papers. So it's your call, counsel. If any one of you say I want oral argument, you got it. If not, I will just do it on paper.

[p. 9] MR. STETTIN: We would like it.

MR. GOULD: Let's have it because I want the record of the case.

THE COURT: All right. Pat, can you give me some time. We are going to give him ten days to file a reply. Can you give me a date sometime in the next 30 days or so for argument.

MR. GOULD: Your Honor, it would have to be in December.

THE COURT: Why is that?

MR. GOULD: Because there are three hearings before the Eleventh Circuit the week of November 26th.

THE COURT: You want me to set it in December, Mr. Stettin?

MR. STETTIN: That's fine with me, Judge.

I was aware of two. I wasn't aware of three.

MR. GOULD: Three.

MR. STETTIN: It's hard to keep up, Judge.

THE COURT: Pat, do we have a Friday that we are setting these down for in December?

The 14th?

THE CLERK: Yes, on the 14th. It would be at 1:00 o'clock.

THE COURT: 1:00 o'clock, December 14th.

any problem with that time?

[p. 10] MR. GOULD: No.

THE COURT: Mr. Stettin, that's okay for you?

MR. STETTIN: Not that I am aware of.

THE COURT: Mr. Gould, that's okay for you?

MR. GOULD: That's fine.

THE COURT: Mr. Davidson.

MR. DAVIDSON: Yes, sir.

THE COURT: All right, we will see you folks back here at that time, and we will take your reply – we will ask you, Mr. Stettin, if you would be kind enough to prepare just a simple order indicating the cause had come on in for a conference today. Pursuant to our discussion, we have given Mr. Gould ten additional days to file a reply to your response, and we had set the matter down for the 14th of December at 1:00 o'clock for argument on the contempt motion.

And if you would show that to Mr. Gould or read it to him and to Mr. Davidson before you submit it to us, we would be much appreciative.

MR. DAVIDSON: Your Honor, I apologize –

THE COURT: Sure.

MR. DAVIDSON: – but I did want the record to be clear. This is argument on the contempt recommendation from Judge Weaver.

THE COURT: Correct.

[p. 11] I take it that's the only issue I have in front of me.

MR. GOULD: Yes.

THE COURT: Thank you all much for your time and efforts. We will see you back here on the 14th.

And thank you, Mr. Stettin, for being kind enough to prepare that for us.

(Proceedings concluded at 9:35 a.m.)

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

February 22, 1993

Mr. Herbert Stettin
Suite 2215, Amerifirst Bldg.
One S.E. 3rd Avenue
Miami, FL 33131

Re: Theodore B. Gould
v. Fred Stanton Smith, Trustee, Miami Center Liquidating Trust, et al.
No. 92-934

Dear Mr. Stettin:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is denied.

Very truly yours,

William K. Suter, Clerk

No. 92-934

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

THEODORE B. GOULD,

Petitioner,

v.

FRED STANTON SMITH, as TRUSTEE OF THE MIAMI CENTER LIQUIDATING TRUST, and BANK OF NEW YORK,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the invalidity of the creation of a liquidating trust for the fraudulent purpose of the avoidance of taxes and a bankruptcy court's appointment of a receiver under a confirmed plan's provisions may be shown in a collateral proceeding.

Whether the Constitution's Excessive Fines Clause prohibits a court's imposition of a coercive fine without consideration of the character and magnitude of the damage done by the continued contumacy.

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PETITION FOR WRIT OF CERTIORARI

Theodore B. Gould, appearing *pro se*, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. The court of appeals affirmed the authority of the United States District Court for the Southern District of Florida to exercise its civil contempt power to

impose a coercive fine of $1,000 per day for the petitioner's failure to comply with the order of a bankruptcy court of the same district to turn over $66,500, the proceeds from the sale of certain personal property in the petitioner's possession, to a liquidating trust created under the provisions of a confirmed plan of reorganization for the purpose of avoiding the payment of income taxes.

OPINIONS OF OTHER COURTS

The judgment of the court of appeals affirmed, without an opinion (App. at 1a), the district court's order. The order of the district court (App. 11a) is unreported. The bankruptcy court entered a contempt order (App. 38a) and a separate order certifying contempt under Rule 9020, Bankruptcy Rules (App. 45a), both of which are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1992 (App. 1a), and a timely suggestion of rehearing in banc (which is treated by the Eleventh Circuit as a petition for rehearing as well, 11th Cir. Civ. R. 35-6) was denied on September 3, 1992 (App. at 3a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

1. Section 105 of the Bankruptcy Reform Act of 1978, as amended, provides in part:

11 U.S.C. Section 105. Power of court.

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

2. Section 1123 of the Bankruptcy Reform Act of 1978, as amended, provides in part:

11 U.S.C. Section 1123. Contents of Plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, a plan shall –

. . . .

(5) provide adequate means for the plan's implementation such as

. . . .

(B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;

(7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee.

3. Section 1129 of the Bankruptcy Reform Act of 1978, as amended, provides in part:

11 U.S.C. Section 1129. Confirmation of Plan.

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title;

. . . .

(5)(A)(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy.

. . . .

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of such debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

4. Section 401 of the Code of Crimes and Criminal Procedure [1988] provides in part:

18 U.S.C. Section 401. Power of Court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as –

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

5. Amendment VIII of the Constitution of the United States provides as follows:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

STATEMENT

1. **The Bankruptcy Proceedings, the Liquidating Trust, and this Court's Judgment in *Holywell Corporation, et al. v. Smith, et al.*, 503 U.S. ___, 112 S.Ct. 1021, 117 L.Ed. 2d 196 (1992).** – This contempt case is a result of the bankruptcy proceedings of the petitioner, the Miami Center Limited Partnership ("MCLP"), Chopin Associates ("Chopin"), Holywell Corporation ("Holywell"), and the Miami Center Corporation ("MCC"). Each of the debtors filed a separate voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Florida in response to foreclosure proceedings initiated by the Bank of New York ("BNY"), the construction lender for the development of the Miami Center, a mixed-use commercial real estate project in downtown Miami, Florida.

MCLP developed the Miami Center. Chopin owned the land underlying MCLP's development. MCC, a wholly-owned subsidiary of Holywell, and the petitioner were general partners of MCLP and Chopin. Holywell was a limited partner of the debtor MCLP, and the parent

stockholder of several solvent corporate subsidiaries[1], for *no* one of which proceedings were commenced by the filing with the bankruptcy court of petitions under a chapter of Title 11. The petitioner was also a limited partner of MCLP and at the commencement of the proceedings had partnership interests in several other entities[2] which owned property.

On December 31, 1984, the bankruptcy court entered an order [C.P. No. 303], on BNY's emergency motion, to treat the proceeds of the sale of property ("Washington Proceeds")[3] as cash collateral, subject to the following conditions:

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[1] Holywell's nondebtor wholly-owned subsidiaries included Twin Development Corporation, Holywell Management of Washington, Inc., Orion Mechanical Services, Inc., Orion Cleaning Services of Washington, Inc., Whitehall Security Corporation, Holywell Leasing Company, and Holywell Telecommunications Company.

[2] On October 22, 1984, the bankruptcy court authorized Holywell and the petitioner, as stockholders and partners of the nondebtor entities, to consummate the sale of certain real and personal property in northern Virginia and Washington, D.C. ("Washington Properties"). These sales were concluded in December 1984 and January 1985.

[3] The Washington Proceeds included the following cash earned in the Commonwealth of Virginia and District of Columbia:

Twin Development	$13,128,533
Holywell Management	1,913,000
Orion Cleaning Services	719,210
Orion Mechanical Services	338,730
Whitehall Security Corporation	573,060
Holywell Corporation	12,303,870
Theodore B. Gould	4,331,157
	$33,307,560

> (c) . . . It will be necessary for Holywell to continue to provide these [administrative] services **until such time as the affairs of these companies, their partners and limited partners are terminated and all obligations to the Internal Revenue Service are determined and paid.** (Emphasis added)

The Bankruptcy Court's order modified a prior order requiring the segregation of the cash proceeds derived from the sale and the issuance of an accounting after distribution of the proceeds by Touche Ross & Co.[4] The petitioner's estate held partnership interests in each of the selling entities.

On August 8, 1985, the bankruptcy court confirmed, **without** conducting a hearing, an amended reorganization plan proposed by BNY on the debtors' behalf. BNY's plan provided, *inter alia*, for the creation of the Miami Center Liquidating Trust ("Liquidating Trust") and the post-confirmation appointment of a trustee, who was assigned possession of Holywell's property and the Washington Proceeds, *see Holywell, slip. op.*, p. 2[5] The bankruptcy court, having held that BNY's claim was "undersecured," 54 Bankr. 41 (Bkrtcy. S.D. Fla. 1985) and that the bank faced a "substantial loss now," *Id.* at 43,

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[4] The report issued on January 25, 1985 noted that the " . . . distributions are before federal income tax liabilities, if any, related to these transactions [and] any income tax liabilities will be the responsibility of the individual partners."

[5] "The plan required the debtors to give up their interests in Miami Center and the proceeds from the sale of the Washington Properties, but otherwise permitted them to remain in business."

denied the debtors' objections [C.P. No. 534] that the plan's provision which substantively consolidated Holywell's property with MCLP's estate was a scheme to avoid the payment of income taxes, that the disclosure statement of BNY's amended plan did not provide adequate information to satisfy the requirements of 11 U.S.C. § 1125, and that the plan was not feasible, since adequate means were not provided for its implementation.

On August 12, 1985, the bankruptcy court entered an order appointing Fred Stanton Smith as trustee of the Liquidating Trust and authorized the trustee to "[e]ngage attorneys, accountants and such further consultants . . . for the purpose of analyzing the legal rights and financial position of the debtors and their respective subsidiaries." [C.P. No. 916][6] Thereafter, although the plan imposed a fiduciary duty on the trustee to manage the property in his custody "in all other ways as would be lawful for any person owning the same to deal therewith . . . ,"[7] the trustee sought and obtained indemnification from BNY. The indemnification was granted prior to commencement of distribution under the plan, for the

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[6] The bankruptcy court has approved the following payments of fees and expenses to the trustee, his attorneys, and accountants:

Fred Stanton Smith (interim)	$ 126,625
Herbert Stettin, P.A. (interim)	444,753
Holland & Knight (final)	375,000
Wilmer, Cutler & Pickering (final)	163,000
Arthur Andersen & Co. (interim)	271,830
Total	$1,381,208

[7] See Art. V, 3(w); also *In re Holywell Corp.*, 911 F.2d 1539, 1547 (11th Cir. 1990)

trustee's actions regarding the Miami Center's sale. The trustee was to be held personally harmless "for payment of unpaid taxes, i.e., Internal Revenue Service claims, which would result from the sale and transfer of the property at the closing. . . . " *Answers of Wolff to Interrogatories.*[8]

The trustee also sought and obtained indemnification for his actions in implementing the plan's provisions, wherein he allowed BNY to take a credit of *$27,050,115* for postpetition interest on its undersecured claim and thereafter disbursed the cash of Holywell, and its nondebtor subsidiaries, to pay the unsecured claims of general creditors against MCLP, without first establishing a reserve for the payment of taxes on the income attributable to the property of the corporations in his custody.

On January 29, 1986, the bankruptcy court amended its Confirmation Order *nunc pro tunc,* adopting verbatim the factual findings proposed by BNY as the prevailing party,[9] including the following relevant conclusions of law:

> 62. . . . Because of controlling provisions of Florida law relating to creditors' rights, substantive consolidation under the Bank's plan here does little more than to adopt and implement

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[8] On May 15, 1987, the original presiding bankruptcy judge held an *ex parte* conference with the trustee and Mr. Wolff, (then a partner of Holland & Knight), at which Mr. Wolff was dismissed as the trustee's attorney, because " . . . Mr. Wolff feels that the confirmation order was erroneous, it should not have been entered, that the plan . . . is defective." *Transcript,* p. 3.

[9] *Miami Center Limited Partnership v. Bank of New York,* 838 F.2d 1547, 1551, n. 4 (11th Cir.), cert. denied, 488 U.S. 823 (1988).

> state law. For example: (a) In due course, a creditor of MCLP could reach (i) Gould's assets (because of his liability as a general partner), . . . (iii) Holywell's assets (**net of its liabilities**), by **levying upon Gould's ownership of 100% of the stock of Holywell.** . . . (Emphasis added)
>
> 66. . . . There has been no evidence to substantiate the debtors' claim that substantive consolidation will somehow cost them "approximately $17 million in Federal income taxes." [C.P. No. 580, p. 2]

The district court affirmed the confirmation order.[10] The Eleventh Circuit subsequently vacated the district court's order and dismissed the debtors' appeal of the confirmation as moot because the plan had been substantially consummated and effective relief could not be granted.[11]

On April 28, 1988, the bankruptcy court granted declaratory relief to the trustee from the statutory obligation to file or pay income taxes related to the plan's implementation, having previously instructed Herbert

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[10] *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340, 353 (S.D. Fla. 1986).

[11] Having granted deference under the "clearly erroneous" standard to the bankruptcy court's adoption of BNY's proposed findings of fact, citing *Anderson v. Bessemer City*, 470 U.S. 564 (1985), the Eleventh Circuit held in part:

> The bankruptcy court did not err in finding, and the district court did not err in affirming, that the plan had been substantially consummated, and that its fairness, feasibility, and propriety had been verified . . . . *Miami Center*, 838 F.2d at 1557.

Stettin, the attorney who had replaced Irving M. Wolff, Esq., to draw the court's order.[12]

The trustee's attorney drafted the court's order, without circulating the proposed draft to opposing counsel and after engaging in *ex parte* communication bankruptcy court,[13] in which it was held that the Liquidating Trust was a grantor trust and the debtors were liable for payment of the taxes as grantors of a trust.[14]

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[12] On April 11, 1988, the bankruptcy judge in *Smith v. United States, et al.*, informed the parties of the court's decision and held as follows:

> . . . By virtue of the fact that this is a declaratory [judgment] on behalf of the Trustee, I am making no decision on liability on behalf of the Bank of New York, Gould, or Holywell. . . .

[13] The degree to which the judicial process was abused by the bankruptcy judge's *ex parte* communication with the trustee's attorney is illustrated by the court's adoption of the factual finding that the separate plans filed on behalf of Holywell and the petitioner's estate did not " . . . provide[d] for the payment for federal income taxes, if any, due on the gain realized from . . . " the sale of the Washington Properties and the Miami Center. In fact, Holywell's plan estimated that taxes in the amount of *$15,000,000* would be payable with a priority superior to the distribution to unsecured creditors, and the plan filed on the petitioner's behalf estimated taxes of *$7,290,000* would be payable in liquidation of the estate's various partnership interests.

[14] The bankruptcy court's judgment concluded in part:

> The relief sought by the debtors and the government would require the complete dismantling of the substantially consummated plan . . . A modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a *pro rata* basis. 85 Bankr. 898, 903 (Bankr. S.D. Fla. 1988).

Although the district court affirmed the bankruptcy court's declaratory judgment, this Court reversed the Eleventh Circuit's divided opinion that the trustee did not breach his duty under the terms of the plan or other statutory provisions.[15] This Court held in part:

> We conclude in this case that the trustee must pay the tax due on the income attributable to the corporate debtors' property because Section 6012(b)(3) requires him to make a return as the "assignee" of the "property . . . of a corporation." We further hold that the trustee must pay the tax due on the income attributable to the individual debtor's property because Section 6012(b)(4) requires him to make a return as the "fiduciary" of a "trust." *Holywell, slip op.*, p. 3.

2. This Contempt Proceeding – The trustee's motion for contempt and other relief (App. at 48a), sought an order certifying that the petitioner was in contempt of the bankruptcy court's "Order of Confirmation and the provisions of Section 1142 of the Bankruptcy Code," (App. at 55a) for refusing to turn over the proceeds of the sale of the concrete pumps on June 2, 1989. The petitioner conveyed

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[15] The Eleventh Circuit had previously affirmed, without argument and issuance of a written opinion, *In re Holywell Corporation*, No. 88-6187, July 7, 1989, *cert. denied*, ___U.S. 1990, the district court's judgment, *93 B.R. 780 (S.D. Fla. 1988)*, affirming the bankruptcy court's dismissal of an adversary complaint alleging that the trustee breached his fiduciary duty and was negligent, *inter alia*, in (1) granting BNY a credit of $27,050,115 in postpetition interest on its undersecured claim against MCLP's estate and (2) the failure to establish a reserve for the payment of income taxes prior to the use of the cash of Holywell, and its subsidiaries, to pay claims against MCLP.

title and possession to the buyer. The trustee did not assert that he had the authority to convey title.[16]

On August 1, 1989, the bankruptcy court entered a Contempt Order against the petitioner, drafted by the trustee's attorney and submitted in an *ex parte* communication with the bankrupcy [sic] judge,[17] in which the petitioner was directed to turn over the sale proceeds to the trustee no later than July 31, 1989 (App. at 41a).

At the hearing on July 27, 1989, the petitioner informed the court that the sale proceeds would not be paid to the trustee, since the trust had been formed for the unlawful purpose of avoiding the payment of taxes and complying with the court's order would cause the case to be moot.[18]

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[16] The trustee testified under oath in the tax case that his duties and control of the property of the estates in his custody were limited to the functions of a disbursing agent and a "contract trustee":

MR. STETTIN: " . . . do you have any other control of any other property other than money of the consolidated debtors?"

MR. SMITH: "No, I do not. . . . "

MR. STETTIN: "Have you done anything except hold title to the money and determine the validity, priority and amount of the claims against the consolidated debtors?"

MR. SMITH: "That's all I have done." *Transcript*, February 11, 1988, p. 87.

[17] The bankruptcy court's *ex parte* communication with its agents and attorneys as a common practice, is a violation of **Rule 9003, Bankruptcy Rules**, and **Canon 3A(4)** of the **Code of Judicial Conduct:** "A judge should . . . neither initiate nor consider *ex parte* communications concernig [sic] a pending or impending proceeding."

[18] *In re Cordova Gonzalez*, 726 F.2d 16, 21 (1st Cir. 1984), *cert. denied*, 466 U.S. 951.

The court imposed a coercive fine of $1,000 for each day from and including August 1, 1989, payable into the court registry, until $66,500 plus interest was paid to the trustee (App. at 41a).

On August 14, 1989, the bankruptcy court entered an order certifying the petitioner to be in contempt under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure for failure to comply with its prior order. (App. at 45a) The petitioner filed timely objections to the order of contempt (App. at 57a).

The petitioner's objections stated, *inter alia*, that the bankruptcy court lacked the statutory authority to appoint a trustee granted the powers of a receiver and vested with title to the individual debtor's bankruptcy estate, while relieving such a trustee of the duty to discharge requirements of law, specifically, the payment of federal and state income taxes, that the creation of the Liquidating Trust was for the unlawful purpose of avoiding the payment of taxes, that an unlawful contract is not enforceable, and that the value or sale proceeds of the concrete pumps was not enumerated as an asset required for the implementation of the Bank's plan.

On May 17, 1991, the district court entered its contempt order, and imposed a coercive daily fine of $1,000 payable to the court registry for failure to comply with its order to turn over the sale proceeds of the concrete pumps to the trustee. (App. at 26a)

The court of appeals affirmed, without an opinion concerning the invalidity of the creation of a trust to avoid taxes, having treated the mandate of this Court's *Holywell* judgment as "water over the dam," 11th Cir.,

Transcript, June 23, 1992,[19] and without consideration of this Court's precedent limiting a court's discretion to impose a fine to coerce compliance with its orders.

REASONS FOR GRANTING THE WRIT

An important consideration in this case is the degree to which the public interest would have been damaged if the petitioner had not used the cash, which the district court's contempt order required that petitioner turn over to the trustee, to pay attorneys' fees related to filing a petition for writ of certiorari in the appeal of the Eleventh Circuit's tax opinion. The case would have been closed. The Bank's scheme to avoid taxes would have been successful, and the unpaid taxes would have been uncollectible.[20] The Eleventh Circuit's mootness doctrine would

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[19] This Court's mandate was issued as of February 25, 1992, and directed the Eleventh Circuit to remand the cause for hearings in conformity with its *Holywell* opinion. The Eleventh Circuit remanded the case to the district court on July 8, 1992, and its mandate issued on August 7, 1992. The district court has not scheduled the remanded hearings.

[20] A precedent would have been established which the Solicitor General has described in the following terms:

> The decision of the court of appeals creates a tax loophole of troubling proportions. It would allow a liquidating trustee to be appointed in a case under Title 11, take title to the debtor's assets, invest or dispose of those assets in a manner that realizes taxable income, but neither report nor pay the taxes owed on that income. **Brief For The United States,** p. 13.
>
> In fact, prior to the issuance of this Court's *Holywell* opinion, it was a common practice for bankruptcy judges to confirm plans which did not provide for the

have disposed of questions related to the tax effects of the Bank's plan and the plan's feasibility.[21] The *Miami Center* mootness doctrine would also have disposed of questions concerning the Bank's scheme to defraud the United States.[22]

The district court's order was entered prior to the issuance of this Court's opinion in *Holywell*, reversing the court of appeals' judgment, in which it was held that the liquidating trustee did not " . . . breach his duty under the

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payment of income taxes arising from the sale of the estate's property, and, since the Bankruptcy Code relieves a trustee appointed in a case under title 11 of personal liability for the taxes, penalties and interest, 11 U.S.C. § 1106(a)(6), when the case is closed, the Internal Revenue Service has no legal means of collecting the taxes.

[21] "We . . . conclude that the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the Plan and is therefore barred." *In re Holywell Corp.*, 911 F.2d at 1543.

[22] "In dismissing the debtors' previous challenge, this court was guided by the important policy of bankruptcy law that court-approved reorganization plans be able to go forward based on court approval unless a stay is obtained. *Miami Center Limited Partnership*, 838 F.2d at 1555. Mindful of that policy, we will not entertain any challenge to the Plan which seeks to modify or amend its provisions.

The district court is correct in the ruling that the allegation of fraud is an attempt to modify or alter the Plan and is therefore barred under the mootness doctrine."

terms of the Plan or other statutory provision . . . to file income tax returns or pay taxes," 911 F.2d at 1546.[23]

In *Holywell*, this Court agreed with the petitioner that, as the assignee of the corporation's property, the trustee must file its returns and pay the taxes on income attributable to the corporation's property, and further that "the trustee must file a return because he is the fiduciary of a trust of an individual," *slip op*, p. 6. This Court also concluded that "The trustee . . . is not acting as the fiduciary of Gould's bankruptcy estate," *id.*, at p. 7, and held that Smith acted as the fiduciary of a trust, *id.*, quoting the Treasury Regulations defining the term "fiduciary" used in 26 U.S.C. § 7701(A)(6).[24]

The court of appeals' decision affirming the district court's authority to exercise its contempt power has sanctioned breach of fiduciary duty, negligence, and unlawful actions of a federally-appointed officer.[25] The consequence of this Court's opinion in *Holywell* require the

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[23] The court of appeals also concluded pertinent to this case:

> Our conclusion does not leave the government without the ability to collect taxes on the post-confirmation sale of property. It simply means that the reorganized debtor, not the liquidating trustee is responsible for such taxes. *Id.* at 1545.

[24] " 'Fiduciary' is a term which applies to persons who occupy positions of peculiar confidence toward others, such as trustees, executors, and administrators. A fiduciary is a person who holds in trust an estate to which another has the beneficial title or in which another has a beneficial interest, or receives and controls income of another, as in the case of receivers. 26 CFR Section 301, 7701-6. *Id.* at *slip op.*, pp. 7-8.

[25] *See King v. United States*, 379 U.S. 329, 337 (1964) paraphrasing *Bramwell v. United States Fidelity & Guaranty Co.*, 269

conclusion that the bankruptcy court lacked authority to confirm the Bank's amended plan, and "neither the approval or the confirmation of [such] a plan can stand." *Protective Committee v. Anderson,* 390 U.S. 414, 435, 441 (1967). The Bank's plan is not feasible,[26] and the bankruptcy court did not " . . . assure itself reorganization will succeed, Section 1129(a)(11), and therefore that the IRS, in all likelihood, will collect the tax owed." *United States v.*

U.S. 483, 488 (1926) citing *Beaston v. Farmers' Bank,* 37 U.S. (12 Pet.) 102 (1838). The manner in which the Absolute Priority Statute operates has been described apart from the inapplicable exception in this case for the Bankruptcy Code, as follows:

> From the language employed in this section, and the construction given to it, from time to time, by this Court, these rules are clearly established: first, that no lien is created by the statute: secondly, the priority established can never attach while the debtor continues the owner and in the possession of the property, although he may be unable to pay all his debts: thirdly, no evidence can be received of the insolvency of the debtor, until he has been divested of his property in one of the modes stated in the section: and fourthly, whenever he is thus divested of his property, the person who becomes invested with the title, is thereby made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property. 37 U.S. (12 Pet.) at 133-134).

[26] The trustee's attorney conceded in the tax case before this Court that the Bank's plan is not feasible:

QUESTION: No, but I'm still asking you, supposing they had acted with due diligence, what would have happened?

MR. STETTIN: The plan would not have been confirmable because one of the requirements under section 1129 is that the plan be shown to be capable of successfully being carried out. Supreme Court, *Holywell,* Transcript, p. 23.

Energy Resources Co., 110 S.Ct. 2139, 2142 (1990).[27] Moreover, the Bank's plan did not comply with 11 U.S.C. § 1129(a)(1), namely § 1122, and did not satisfy the Fair and Equitable Standard. *In re Holywell Corp.*, (Miami Center Joint Venture v. Bank of New York), 913 F.2d 873, 879-88) (11th Cir. 1990).

The court of appeals has adopted a common law mootness standard *without* constitutional or statutory authority to dismiss the debtors' appeal of the bankruptcy court's confirmation order, *Miami Center*, 838 F.2d

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[27] The burden of proof concerning a determination of the plan's future tax effects was on the Bank as the plan's proponent, "in the preparation and judicial approval of [the] reorganization plan . . . by which the fairness and feasibility of the plan [could] be ascertained," W. T. Plumb, *The Tax Recommendations of the Commission on the Bankruptcy Laws – Tax Procedures*, 99 HARV.L.REV. 1360, 1467 (1975). However, the Bank did *not* request that the bankruptcy court estimate the amount of the tax liabilities arising from the plan's implementation and did not seek a private ruling from the IRS for a declaration of the tax effects of its amended plan prior to confirmation. *See S. Rep., No. 1106, 95th Cong., 2d-Sess 28 1978).* Instead, the Bank's position was that the IRS had not protected the interests of the United States and its pleading before this Court stated, in relevant part, as follows:

> Having failed to exercise the requisite diligence in bankruptcy court, the IRS now advances a strained statutory argument in an effort to collect the debtors' taxes from **funds that the plan of reorganization explicitly reserves for other creditors.** . . . [T]he IRS should not be permitted to absent itself from the negotiating table and then demand a form of superpriority payment after the plan has been confirmed. *Id.* at pp. 11-12. (Emphasis added) **Brief In Opposition Of Respondent The Bank of New York,** pp. 11-12.

at 1553;[28] a plan has been implemented which does not satisfy the requirements of the Fair and Equitable Standard;[29] and the court's contempt power has been used to

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[28] The court of appeals has relied on the *Miami Center* mootness doctrine to dismiss the debtor MCLP's right to recover post-petition interest of *$27,050,115* which the trustee allowed the Bank to take as a credit, having sought and obtained indemnification for his conduct, because "the credit is now lawful in the sense that it is an integral component of the confirmed Plan. . . . " *In re Holywell Corp.*, (Miami Center Limited Partnership v. Smith), No. 88-151-Civ-Aronovitz (S.D. Fla., July 21, 1988), *appeal dismissed*, No. 88-5770 (11th Cir., January 9, 1991), *cert. denied*, ___ U.S. ___ (1991).

The court of appeals also used the *Miami Center* mootness doctrine to deny MCLP's right to recover an estimated *$8.7 million* in interest which the Bank unilaterally determined to be payable under the contract documents. The Eleventh Circuit held in part:

> It might be true that the notes called for a lower interest rate than that accepted by the bankruptcy court. . . . Altering the amount of interest would change the amount of the judgment lien, which in turn would modify the terms of the sale to the Bank, to which the Bank agreed. . . . This would strike at a crucial element of the reorganization plan. . . . The amount of interest . . . was included in the Bank's bargain for the purchase of the project, which constituted a large part of the confirmed plan.

In re Holywell Corp. (Miami Center Limited Partnership v. Bank of New York), 901 F.2d 931, 933 (11th Cir. 1990), *cert. denied*, 111 S.Ct. 713 (1991).

[29] See *United States v. Key*, 90 S.Ct. 1049 (1970): "This court has long held that . . . the words 'fair and equitable' . . . in no way authorize a district court to evade priorities otherwise granted by law . . . and it . . . cannot be taken to exclude by implication an explicit statutory priority, such as that granted to the United States." 90 S.Ct. at 1052.

deter petitioner from raising in collateral proceedings the issue of the trustee's personal liability for breach of fiduciary duty related to the failure to pay taxes and commingling the accounting of the estates in his custody.

1. The Invalidity of the Bankruptcy Court's Appointment of a Receiver is a Jurisdictional Issue Which May Be Shown in a Collateral Proceeding – This Court has held that there are certain strictly jurisdictional facts " . . . the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity," *Noble v. Union River Logging Railroad Co.*, 147 U.S. 165, 173 (1892), and cited *Griffith v. Frazier*, 8 Cranch 9, 23 (1814) for the principle that if a court lacked authority to appoint an officer of the court to administer an individual's estate, then the judgment of the court must fail for want of jurisdiction and its invalidity may be shown in a collateral proceeding. In such a case, *Griffith* held that the court's appointment is void *ab initio* and all of the trustee's acts as the court's agent are also void. *8 Cranch at 27.*

The plain language of 11 U.S.C. § 105(b) limits the power of a court in a bankruptcy proceeding and specifically prohibits the appointment of a receiver in a case under title 11. As the Seventh Circuit Court of Appeals held in a pertinent discussion of Section 105(b):

> As the legislative history explains, "the bankruptcy code has ample provision for the appointment of a trustee [i.e., under Section 1104] when needed. Appointment of a receiver would simply circumvent the established procedures."

In re Memorial Estates, Inc., 797 F.2d 516, 519 (1986).[30]

As the plan's proponent, and a party in interest, the Bank could have requested the appointment of a trustee in a case under title 11 at any time after commencement of the case, but before confirmation of the plan, in accordance with the Best Interests Standard defined in 11 U.S.C. § 1104(a)(2). The duties of such a trustee would have included filing tax returns required by law in accordance with 11 U.S.C. § 1106(a)(6). No question would have arisen about whether the liquidating trustee was required to file the returns as a fiduciary under 26 U.S.C. § 6012(b).

The intent of Congress in limiting a bankruptcy judge's authority to appoint a receiver was to remove the court from the criticized practice under the pre-Code Bankruptcy Act of appointing an officer that would appear in litigation before the court against an adverse party.[31]

In *Spring Valley Water Co. v. San Francisco*, 246 U.S. 391, 395 (1918), this Court defined the term "receiver" as " . . . embracing any person acting as [an] agent or depository of funds for a court." Although this Court's *Holywell* opinion does not resolve the question of whether the trustee appointed under the provisions of the Bank's

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[30] See also *Notes of Committee on the Judiciary, Senate Report No. 95-989*: " . . . the bankruptcy judge is prohibited from appointing a receiver in a case under title 11 under any circumstances. . . . "

[31] Subsection (c) of 11 U.S.C. § 1104 grants authority to the United States trustee to select and appoint a trustee or examiner which a court has ordered to be appointed.

plan is a receiver, if the trustee is entitled to receive and hold the income from the sale of the concrete pumps, acting on behalf of an estate of which the petitioner is the beneficial owner, then the trustee must be deemed a receiver under this Court's *Spring Valley* definition and under the common usage of the term as defined in *Black's Law Dictionary*, Vol. v, p. 1140.[32]

This Court's *Holywell* opinion concludes that the Bank's plan "created a separate and distinct trust holding the property of the estate and gave the trustee control of this property" in accordance with 11 U.S.C. § 1123(a)(5)(B), *slip op.*, p. 7. However, the question of whether "the Bankruptcy Code permits a plan to place a new fiduciary in charge of an estate after confirmation," *slip op.*, p. 6, was not resolved.

The resolution of this question is the threshold jurisdictional issue in this contempt case. The district court's conclusion that "Article V of the plan . . . provides specifically for the appointment of a trustee of the Miami Center Liquidating Trust to implement the plan" (App. at 11a) does not resolve the question of whether the bankruptcy court had statutory authority to appoint a receiver under the provisions of a creditor's liquidating plan and to force the debtor to engage in unlawful conduct and

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[32] A "receiver" is defined, in relevant part, as follows:
A ministerial officer, agent, creature, hand, or arm of, and a temporary occupant and caretaker of the property for the court, and he represents the court appointing him, and he is the medium through which the court acts. . . . He is a trustee or ministerial officer representing court, and all parties in interest in litigation, and property or fund entrusted to him."

cooperate with such an agent in compliance with the plan. (App. at 10a)

Various courts have held that "while not expressly recognized by the Code, a liquidation agent named by the plan proponent, with duties and manner of compensation set out in the plan, is an appropriate party to effectuate a liquidation plan."[33] In *Jorgenson*, the BAP of the Ninth Circuit defined the authority of such a liquidation agent as follows:

> The appointment of the liquidating and disbursing agent is consistent with Section 1123(b)(5). Traditionally, courts have appointed agents to make disbursements pursuant to plans, the function of a trustee with limited powers. Here, the property of the estate does not vest in the debtors until such time as all claims are paid in full. *66 B.R. at 108.*

The problems arising from avoiding the statutory prohibition on a court's authority to appoint a receiver by

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[33] See *In re Schultz*, 69 B.R. 629, 631 (D.S.D. 1987), citing *In re Jorgensen*, 66 B.R. 104, 108 (9th Cir. BAP 1986):

> A liquidating and disbursing agent named in the liquidating plan is an appropriate entity for carrying out a liquidating plan. . . . Several Code sections support a bankruptcy court's power to appoint or approve a liquidating agent. See 11 U.S.C. Section 105(a), 327(a), 1123(b)(5). . . . Any actions taken by such an agent can be enforced by the bankruptcy court. . . . "

See *also In re Rolling Green Country Club*, 26 B.R. 729 (Bkrtcy. D. Minn. 1982); *In re Sonner*, 53 B.R. 859 (Bkrtcy. E.D. Va. 1985); *In re Chase & Sanborn*, 58 B.R. 721 (Bkrtcy. S.D. Fla. 1986); *In re Southern Industrial Banking*, 58 B.R. 721 (Bkrtcy. S.D. Fla. 1986); 71 B.R. 351 (Bkrtcy. E.D. Tenn. 1987).

referring to the court's officer as a "liquidating and disbursing agent" have been illustrated in this case. See *In re Holywell Corp.*, 911 F.2d at 1546.[34] The Eleventh Circuit concluded that " . . . neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes," *Id.*, having relied upon the following pertinent analysis:

> In deciding whether to extend the provisions of section 6012, we find *In re Allen Wood Steel Co.*, 7 B.R. 697 (Bkrtcy. E.D. Pa. 1980) instructive. In *In re Allen Wood Steel Co.*, the bankruptcy court refused to extend the provisions of section 6012 to a disbursing agent under facts similar to this case. We agree with the district court that section 6012 does not apply to a liquidating trustee and rely on its analysis. . . . "

In *Bull v. United States*, 295 U.S. 249, 260 (1935), this Court held that taxes are the "life-blood" of government. However, more than seven years have elapsed since the bankruptcy court confirmed the Bank's amended plan and the trustee took possession of substantially all of the property of the debtors' estates.[35] Nevertheless, federal and state income taxes have not been paid.[36]

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[34] The majority opinion of the Eleventh Circuit held, in relevant part, as follows: "First, we conclude that the liquidating trustee is not a trustee under Title 11, but rather a contract trustee performing limited and essentially ministerial duties. Second, we agree that the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan makes him similar to a disbursing agent rather han [sic] an assignee or fiduciary." *911 F.2d at 1546.*

[35] The trustee took possession of assets with a fair market value of *$338,123,076* as of October 10, 1985, including cash and securities in the amount of *$37,488,326*, the right to repayment

Notwithstanding that the intent of Congress in enacting the injunctive provisions of the predecessor of 11 U.S.C. § 524(a)(2) was to stop the abuses arising from the commencement of lawsuits against debtors[37] "who were unable to obtain counsel because bankruptcy had stripped them of their assets," *Brown v. Felsen*, 442 U.S. 127,

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of certain super-priority loans authorized by the bankruptcy court in the amount of *$4,827,937*. The trustee has also received postconfirmation income on behalf of Holywell and the petitioner's estate in the amount of *$19,605,219* in interest, judgments and partnership distributions as of June 30, 1992.

[36] The IRS Final Report, issued on July 13, 1992, to Fred Stanton Smith, as assignee of Holywell Corporation's property, has assessed corporate income taxes of *$20,695,806* plus penalties for negligence and late payment in the amount of *$5,975,648*. (App. 116a)

The Commonwealth of Virginia has issued a Final Assessment for taxes, penalties, and interest in the amount of *$3,791,098.84* as of July 31, 1992.

As of July 31, 1992, the trustee had misappropriated *$18,710,000* in cash of Holywell and its subsidiaries to pay claims against MCLP's estate (App. at 124a).

[37] The trustee has filed various lawsuits against Holywell and the petitioner to determine his rights and protect himself from lawsuits alleging breach of fiduciary duty and negligence in the management of the property in his fiduciary custody, namely, (a) failure to establish a reserve and pay federal and state income taxes; (b) allowing the Bank to take a credit of *$27,050,115* in postpetition interest on its undersecured claim; (c) conveying the property without consideration and failure to collect the accounts receivable of HTC and HLC in the amount of *$11,932,793* as of October 10, 1985; and (d) misappropriation of the cash of Holywell, and its nondebtor subsidiaries, engaged in business in Virginia and the District of Columbia, to pay claims against MCLP without first paying their income tax liabilities.

135 (1979), the petitioner has been forced to borrow funds and incur substantial liabilities to pay attorneys' fees to defeat the Bank's scheme to avoid the payment of taxes and to pay accounting expenses to segregate the assets and liabilities which the trustee and his accountants commingled.[38] (App. at 124a)

The legislative history of the Bankruptcy Code reflects the public policy that the bankruptcy laws should not be applied in a manner to avoid taxes:

> [T]ax collection rules for bankruptcy cases have a direct impact on the integrity of the Federal, State and local tax systems. These tax systems generally based on voluntary assessment, work to the extent that the majority of taxpayers think they are fair. This presumption of fairness is an asset which should be protected and not jeopardized by permitting taxpayers to use bankruptcy as a means of improperly avoiding their tax debts. To the extent that debtors in a bankruptcy are freed from paying their tax liabilities, the burden of making up the revenues thus lost must be shifted to other taxpayers.[39]

11 U.S.C. § 1123(a)(7) prohibits the appointment of a trustee under the provisions of a plan in a manner which is inconsistent with public policy. Furthermore, the authority of a court to confirm a plan is limited by the

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[38] The trustee's conduct in these proceedings should be compared with the general rule that a trustee in his administration of a trust is under the duty of acting exclusively and solely in the interest of the trust estate or the benficiaries [sic], within the terms of the trust, and is not to act in his own interest or in the interest of a third person. *76 AM Jur 2d Trusts Section 316.*

[39] S.Rep. No. 989, 95th Cong., 2d Sess. 1315 (1978).

enumerated requirements of § 1129(a) and specifically requires that the appointment of a trustee or any successor to the debtor is consistent with public policy, *Section 1129(a)(5)(A).*

This Court has made the test of a plan's feasibility the principal determinant limiting a bankruptcy court's jurisdiction in tax matters. As previously explained, the determination of a plan's feasibility imposes a duty upon a bankruptcy court to assure itself that the future tax effects of a plan will be satisfied, the tax collector paid, and that the debtor will have a "fresh start."

In this case, the bankruptcy court concluded that "The payment of federal income taxes would, of necessity, be an impermissible modification of the confirmed plan," 85 B.R. at 903, because the court construed the provisions of the Bank's plan under which the Liquidating Trust was created and a trustee appointed as relieving the trustee of the duty to pay income taxes.

2. A Court Will Not Enforce a Contract Made to Defraud the Law and a Trust Created for the Fraudulent Purpose of Avoiding Taxes is Unlawful – The degree to which the proceedings have departed from the judicial standard is illustrated by the court of appeals' affirmance of the district court's exercise of its contempt power based on concluding that the Bank's plan is a binding contract (App. at 19a) and that the trustee's refusal to pay income taxes was not relevant. (App. at 20a)

This Court's historical precedent precludes a court from enforcing a contract entered in fraud of a law of the United States. A contract made contrary to law is an act *in fraudem legis,* and in *Hannay v. Eve,* 3 Cranch 241 (1856),

Chief Justice Marshall's opinion stated, in relevant part, as follows:

> [A] contract being clearly in fraud of the law . . . a law to which, under the circumstances attending to it, no just exceptions can be taken, its execution cannot be compelled by the courts of that country to evade whose laws it was made. *3 Cranch at 247.*

This fundamental rule was restated in *Craig v. State of Missouri*, 41 Peters 408, 436 (1830) and *Bank of the United States v. Owens*, 27 U.S. 527, 538 (1829)[40] Similarly, this Court held in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961), that "a statute frequently implies that a contract is not to be enforced when it arises out of circumstances that lead enforcement to offend the essential purpose of the enactment."

It is also a fundamental rule that a court will not sanction conduct or enforce contracts injurious to the state and public interest. The *Restatement of Trusts* provides in Section 63(1) that a trust is invalid if the purpose of the settlor in creating the trust is to defraud creditors, and *Scott on Trusts* states that where a trust is made to avoid taxes or otherwise to defraud the government, the trust is unlawful and will fail.[41]

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[40] "Courts are instituted to carry into effect the laws of a country, how can they become auxillary [sic] to the consummation of violations of law?" *27 U.S. at 538.*

[41] BNY has stated that "Even a cursory review of these documents [i.e., the Bank's plan and disclosure statement] would have revealed that no provisions were included in the plans for payment by the Liquidating Trust of any taxes resulting from the disposition of the debtors' property," 11th Cir., *Answer Brief, Smith v. United States, et al.*, p. 25.

[T]he rationale for creation of a liquidatng [sic] trust as follows:

> The IRS's own Revenue Ruling indicates that the Liquidating Trust, even if determined to be liable for taxes, would not have been liable for any federal income taxes relating to the Miami Center project since its basis in any property was equal to its sale price. Rev. Ruling 63-228, 1963-2 Cum. Bull. 229. . . . In that Ruling, assets were transferred from a bankrupt's estate to a trust established for the benefit of creditors. The Ruling viewed the transfer to be a transfer in satisfaction of the creditors' claims. Since the Trust took the Miami Center Project for the benefit of creditors at its fair market value and simultaneously disposed of it at the same time, no gain was realized by the Liquidating Trust in any event. *Id.* at 23.

BNY also explained that " . . . the Liquidating Trust is a grantor trust for federal income tax purposes [and] . . . is *not* subject to tax; however, the grantors, i.e., the Debtors, may be subject to tax on their income."[42] The trustee adopted this position and stated:

> The Miami Center Liquidating Trust is a grantor trust as defined under subpart E of subchapter J of the Internal Revenue Code, 26 U.S.C. Sections 671-79. The trust thus has no responsibility to pay the Debtors' taxes. The beneficial owners of the trust, the Debtors in this Chapter 11 proceeding, are taxed separately.

Notwithstanding the conflict with the precedent of the Ninth Circuit in *Richardson v. The United States of America,*

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[42] S.D. Fla., Consolidated Answer Brief, *Smith v. United States, et al.*, p. 15.

552 F.2d 291 (9th Cir. 1977) and *De Pinto v. United States of America*, 585 F.2d 405 (9th Cir. 1978), the courts below sanctioned this injurious policy, although the Ninth Circuit held that the filing of a petition in bankruptcy is not a donative act of the settlor of a trust.

This Court has held that the facts in *In re Sonner*, 53 B.R. 859 (E.D. Va. 1985), which applied the grantor trust provisions to a liquidating trust created under the provisions of a confirmed plan, were distinguishable from this case. *Holywell, slip op.*, p. 8. However, satisfying the public interest in the administration of the tax and bankruptcy laws requires eliminating the degree to to which the creative genius of attorneys may use the technical considerations of the law of trusts to avoid the payment of taxes.[43] The Bankruptcy Code provides for liquidation under Chapter 7. Allowing the creation of a liquidating trust as a grantor trust under a liquidating plan proposed in Chapter 11, in which all of the assets of a debtor's

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[43] It has been estimated that approximately 20 to 30 percent of Chapter 11 cases are liquidations. Recent Chapter 11 cases involving a "liquidating trust" have included *Toren v. Braniff, Inc.*, 893 F.2d 763, 765 (5th Cir. 1990); *In re Goldblatt Bros.*, 106 Bankr. 522 (Bankr. N.D. Ill. 1989); *In re Highway Equip. Co.*, 120 Bankr. 910, 911 (Bankr. S.D. Ohio 1990); *In re Crowthers McCall Patterns, Inc.*, 120 Bankr. 279, 283 (Bankr. S.D. N.Y. 1990); *In re Mako, Inc.*, 120 Bankr. 198, 200 (Bankr. E.D. Okla. 1990); *In re Mortgage Inv. Co.*, 111 Bankr. 604, 609 (Bankr. W.D. Tex. 1990). The bankruptcy court's opinion in *Sonner* illustrates the degree to which the public interest has been damaged ("Courts which have determined that a [liquidating] trustee may not be taxed pursuant to section 960 have held the tax to be an impermissible burden upon the liquidation process." 53 B.R. at 866)

estate are vested in a liquidating trust, defeats the priority for the distribution in liquidation of the property of a debtor's estate in accordance with *11 U.S.C. Section 726.*

In this case, absent the creation of the Liquidating Trust and substantive consolidation of the debtors' estates, based on the petitioner's ownership of Holywell's capital stock,[44] to create a "common pool of assets to pay all claims" (App. at 124a), the distribution of the proceeds from the sale of all of the property of the estates of Chopin and MCLP in liquidation would have caused the principal amount of MCLP's unsecured creditors to be paid prior to payment of the Bank's postpetition interest, which would have had a priority superior only to MCLP's equity. Holywell and its subsidiaries would have had adequate cash to pay their federal and state income taxes.

Instead the Liquidating Trust's creation as a separate taxable entity, and the treatment of the transfer of the assets of the individual debtor's estate as a sale in

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[44] The bankruptcy judge explained the consolidation of the debtors' estates as follows:

> . . . the predicate for the assertion that the assets of Holywell properly are subject to the claims of the other entities is the link through Gould. If Gould, in fact, controls, and I assume tha [sic] the word "controls" also is "owns," I mean "own and controls," has the power to dispose of the assets of Holywell and if he simultaneously, in the same capacity, is indebted to those other entities, isn't that the same thing as saying that Holywell is indebted to those others.

During the substantive consolidation hearing, the bankruptcy court acknowledged that " . . . there might be adverse tax consequences . . . " as a result of implementation of BNY's Plan.

exchange for the discharge of indebtedness, failed to preserve the NOLs as property of the petitioner's estate and has caused the imposition of an alternative minimum tax of *$1,147,545* on the individual debtor's bankrutpcy [sic] estate. Furthermore, the failure to preserve the estate's partnership interest in the Miami Center Joint Venture's NOLs has caused an additional tax burden of an estimated *$2,150,000* payable for income earned in 1991.

3. A Court's Discretion to Impose a Fine to Coerce Compliance with its Orders Is Limited and the Constitution's Excessive Fines Clause Has Been Violated – The court of appeals' affirmance of the district court's contempt order is contrary to this Court's precedent defining the limits of a court's authority to exercise its civil contempt power in accordance with the Constitution's Excessive Fines Clause.

The district court's contempt order must be reversed because of the degree to which this contempt proceeding has departed from the standard in *Bloom v. Illinois*, 391 U.S. 194 (1968), cited by Justice Scalia in his concurring opinion in *Young, et al. v. United States ex rel. Vuitton et fils*, 481 U.S. 418, 823 (1987):

> First, it [Bloom] eliminates this Court's only holding that the courts must have autonomous power to hold litigants in contempt as a means of enforcing their judgments. And second, it makes clear that the argument from necessity to the existence of an inherent power must be restrained by the totality of the Constitution, lest it swallow up the carefully crafted guarantees of liberty.

The plain language of 18 U.S.C. § 401 limits a court's discretion to punish by fine contempt of its authority, and " . . . none other, as . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The threshold question in this case is whether the turnover orders of the bankruptcy court and district court are lawful decrees issued within the court's statutory authority to exercise jurisdiction. 28 U.S.C. § 1334 grants a district court original and exclusive jurisdiction of all cases under title 11 and exclusive jurisdiction of all of the property of a debtor's estate as of the commencement of the case. 28 U.S.C. § 157(b) grants authority to a bankruptcy judge to hear and determine all cases under title 11 arising, *inter alia*, from matters concerning administration of the estate, turnover of the estate's property, avoidance of fraudulent conveyances, and the sale of the estate's property.

This case concerns a transaction involving the sale of property *after* confirmation. The trustee did *not* succeed to physical possession, custody or control of the concrete pumps at the commencement of the proceedings. (App. at 38a) The petitioner conveyed title of the property to the Buyer under the provisions of a special warranty deed.

The bankruptcy court relied on a provision in the Bank's plan to exercise jurisdiction to issue its turnover order, *Art. XIV, Retention of Jurisdiction*, p. 41, notwithstanding that the plan's reservation of jurisdiction is limited to matters related to the determination of timely filed preconfirmation claims of creditors, see *Holywell, slip op.*, p. 10, and "any orders which may be necessary or appropriate to carry out the plan's provisions.

In *United States v. City of Yonkers*, 856 F.2d 644, 659 (2nd Cir. 1988), the Second Circuit held that " . . . the law of contempt exerts some outer limits on the normally 'wide discretion' of a district court to fashion appropriate remedies to secure compliance with its lawful orders." Similarly, this Court's opinion in *Spallone v. United States*, 110 S.Ct. 625, 633 (1990), citing the Second Circuit's opinion in *Yonkers*, 856 F.2d at 454, quoting *Anderson v. Dunn*, 6 Wheat 204, 231 (1821), stated as follows:

> . . . the use of the contempt power places a[n] . . . limitation on a district court's discretion, for as the Court of Appeals recognized, "in selecting contempt sanctions a court is obliged to use the 'least possible power adequate to the end proposed."

The limits of a court's discretion to impose a fine to coerce compliance with its lawful orders are explained in *United States v. United Mine Workers*, 330 U.S. 258, 303 (1946), in relevant part, as follows:

> . . . where the purpose is to make the defendant comply, [the court] . . . **must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.**
>
> It is a corollary of the above principle that a court which has returned a conviction for contempt must, **in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.** (Emphasis added)

The Eleventh Circuit's affirmance of the district court's civil contempt order is also in conflict with the Ninth Circuit Court of Appeals' opinion in *Donovan v. Mazzola*, 761 F.2d 1411, 1417 (9th Cir. 1985), that a present inability to comply is a complete defense to civil contempt, and the past ability to comply is not *res judicata* as to a continuing ability to comply.

As this Court held in *United States v. Rylander*, 460 U.S. 752 (1983), the ability to comply is a crucial inquiry for a court's decision concerning coercive civil contempt orders, and the court is required to weigh all the evidence properly before it determines whether or not there is actually a present ability to obey and whether failure to do so constitutes a deliberate defiance or wilfull disobedience which a coercive sanction will remedy. See also *Maggio v. Zeitz*, 333 U.S. 56, 76 (1948).

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

/s/ Theodore B. Gould
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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

IN RE: HOLYWELL CORPORATION, et al., Debtors	Case No. 84-01590-BKC-SMW 84-01591-BKC-SMW 84-01592-BKC-SMW 84-01593-BKC-SMW 84-01594-BKC-SMW
THEODORE B. GOULD, Appellant, v. FRED STANTON SMITH, Trustee of the Miami Center Liquidating Trust, Appellee	District Court No. 89-02629-Civ-Marcus CASE NO. 91-5741

APPELLANT'S INITIAL BRIEF

Theodore B. Gould, *pro se*
2568-D Ivy Road
Charlottesville, Virginia 22901

On Appeal From The United States District Court
For The Southern District of Florida
The Honorable Stanley Marcus Presiding

CERTIFICATE OF INTERESTED PERSONS

District Judge Stanley Marcus

Chief Bankruptcy Judge Sidney M. Weaver

The Bank of New York:

Thomas Noone, Esq.
Vance Salter, Esq.
Harvey Ziegler, Esq.

Herbert Stettin, Esq.

Fred Stanton Smith

United States of America:

Gary Gray, Department of Justice

PARTIES TO THE PROCEEDINGS

Appellant contemnor Theodore B. Gould, a resident of the County of Albemarle, in the Commonwealth of Virginia, filed a petition for reorganization pursuant to Chapter 11 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Florida on August 22, 1984, in response to foreclosure proceedings initiated by the Bank of New York against the property of Chopin Associates and the Miami Center Limited Partnership (hereinafter referred to as the "Miami Center"), related entities which separately filed petitions for reorganization in Chapter 11 at the same time.

Appellee Fred Stanton Smith, a resident and citizen of the State of Florida, was appointed as the individual designated as "trustee" of the Miami Center Liquidating Trust by the bankruptcy court on August 12, 1985, App. *1a*, in accordance with Article V, *Creation of Trust*, of a plan of reorganization proposed by the Bank of New York on the dectors' behalf, and confirmed on August 8, 1985. App. *8a*

Although Article V, *Creation of Trust*, 3(x) *limits* the trustee's authority to liquidate property of the debtors' estates to the Miami Center's sale, various judges of the district court and the Eleventh Circuit have referred to the trustee as a "liquidating trustee."[1]

The Bank of New York (hereinafter referred to as "the Bank"), a banking corporation chartered and having its principal office in the city of New York, is an interested party. The Bank was the interim construction lender for the Miami Center's development.

On February 26, 1985, the Bank proposed a reorganization plan on behalf of MCLP, Chopin, the Miami Center Corporation,[2] Holywell Corporation,[3] and Theodore B. Gould, as debtors, thereafter amended, in which it offered to purchase the land, leasehold improvements, and certain chattels, referred to collectively as the "Miami

---

[1] Compare the Amended Disclosure Statement, Article V, *Miami Center Liquidating Trust*, which provides, in relevant part:

> "Under BNY's plan *a trustee will be appointed on the Effective Date to implement the plan on behalf of the Debtors. The Trustee's principal duties will be to administer the affairs of Miami Center*, the only operating asset of the Debtors, pending the sale to BNY, *to take whatever assets are required to perform the Contract of Sale with BNY*, to hold title to the remainder of the assets of the Debtors, including the Washington Proceeds, and to supervise the diytribution [sic] to Creditors. . . ." (Emphasis added)

[2] The Miami Center Corporation is a corporate general partner of Chopin and MCLP.

[3] Holywell Corporation is the parent stockholder of the Miami Center Corporation. Theodore B. Gould is the sole stockholder of Holywell Corporation.

Center," for $255.6 million, and specifically enumerated the assets available for distribution to creditors in Article IV, *Means For Execution Of The Plan.*[4] App. *15a.*

STATEMENT REGARDING ORAL ARGUMENT

Contemnor Theodore B. Gould requests that oral argument be heard. This case involves the use of the court's contempt power in violation of the individual's rights under the Due Process Clause and the Excessive Fines Clause of the Constitution.

This appeal also involves complex questions regarding (1) the bankruptcy court's exercise of *in personam*

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[4] Article IV, *Means For Execution Of The Plan,* provides, in relevant part, as follows:

> "The plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000. . . . The purchase price would be paid and applied in the following manner: (a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Closing Date ($242,727,923.47). . . . (b) BNY would pay the balance of the purchase price in cash ($8,168,509.60) to the Trustee. . . . Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell loan ($2,198,109.46) and the balance of the Washington Proceeds ($29,134,472.59) will be available for distribution to creditors." Thus, $35,104,872.73 in cash was "put to the disposition of the creditors for the payment of liens, taxes, city and county taxes, the IRS, *all of the creditors in these estates. . . .* " [Bkrtcy. S.D. Fla., *Transcript,* May 31, 1985, Vance Salter, Esq., The Bank of New York's attorney.]

post-confirmation jurisdiction over an individual discharged as a debtor after the administration of the debtor's estate has ended as an effect of confirmation, see *11 U.S.C. Section 1141(b)*; and (2) the authority of a bankruptcy court to appoint a receiver *after* confirmation under the provisions of a plan, see *11 U.S.C. Section 105(b)*, granted authority to receive post-confirmation income on behalf of a discharged debtor, derived from the sale of property not specifically enumerated as assets required for distribution in the payment of claims, and relieved of the statutory duty as an agent of a court of the United States to pay federal and state income taxes. See *28 U.S.C. Section 960*.

STATEMENT OF APPELLATE REVIEW

In appellate review, a district court's findings of fact and conclusions of law, affirming a bankruptcy court's order certifying civil contempt and imposing punitive sanctions, is subject to *de novo* review.

This appeal largely concerns issues of law, and the district court's conclusions of law are subject to *de novo* review by a court of appeals. Const., Art. III, Sect. 2; *Northern Pipe Line Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982); and *United States v. Raddatz*, 447 U.S. 667 (1980). "When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina College v. Russell*, 111 S.Ct. 1217, 1224 (1991).

A bankruptcy court's findings of fact, based upon the credibility of witnesses, will not be set aside unless they are clearly erroneous. *Bankruptcy Rule 8013*. However,

"where there is a general pattern of substantially verbatim adoption of one party's proposed findings . . . and the evidence supporting the decision is of a doubtful nature, the record must be examined with special care on controverted points." *Kinnett Dairies, Inc. v. Farrow,* 580 F.2d 1260, 1268, note 18 (5th Cir. 1978). A standard of careful scrutiny must be applied and "where the court has not independently set out its findings we think the reviewing court may more readily be ' . . . left with a definite and firm conviction that a mistake has been committed'." *Louis Dreyfus & Cie v. Panama Canal Co.,* 298 F.2d 733, 737-738 (5th Cir. 1962), quoting *Mesle v. Kea Steamship Co.,* 260 F.2d 747, 750 (3rd Cir. 1958), *cert. denied* 359 U.S. 966 (1959).

OPINIONS BELOW, CONSTITUTIONAL AND STATUTORY PROVISIONS

The pertinent opinions and relevant documents in the proceedings below are set forth in a separate Appendix of the Record Excerpts ("App. ___).

The applicable constitutional provisions in this appeal are as follows:

> AMENDMENT V:
>
> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The applicable statutory provisions in this appeal are as follows:

28 U.S.C. Section 157 provides as follows:

"(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation

of claims or interest for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from

claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy

judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceedings requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. Section 158(d) provides as follows:

"(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section."

28 U.S.C. Section 1334 provides as follows:

" (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed

to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of the estate."

11 U.S.C. Section 105 provides as follows:

" (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation."

11 U.S.C. Section 1123(a) provides, in relevant part, that the contents of a plan shall:

"(5) provide adequate means for the plan's implementation such as –

> (A) retention by the debtor of all or any part of the property of the estate;
>
> (B) transfer of all or any part of the property of the estate to one or more entities, whether organized before or after the confirmation of such plan;
>
> . . .
>
> (7) contain only provisions that are consistent with the interests of creditors and equity security holders and with public policy with respect to the manner of selection of any officer, director, or trustee under the plan and any successor to such officer, director, or trustee."

11 U.S.C. Section 1129(a)(5)(A) provides, in relevant part, that a court shall confirm a plan only if the following requirement is met:

> " (i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and
>
> (ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy;. . . . "

11 U.S.C. Section 1104, Appointment of trustee or examiner, provides as follows:

"(a) at any time after the commencement of the case but before confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of a trustee –

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

(b) If the court does not order the appointment of a trustee under this section, then at any time before the confirmation of a plan, on request of a party in interest, and after notice and a hearing, the court shall order the appointment of an examiner to conduct such an investigation of the debtor as is appropriate, including an investigation of any allegations of fraud, dishonesty, incompetence, misconduct, mismanagement, or irregularity in the management of the affairs of the debtor of or by current or former management of the debtor, if –

(1) such appointment is in the interests of creditors, any equity security holders, and other interests of the estate; or

(2) the debtor's fixed, liquidated, unsecured debts, other than debts for goods, services, or taxes, or owing to an insider, exceed $5,000,000.

(c) If the court orders the appointment of a trustee or examiner, if a trustee or an examiner dies or resigns during the case or is removed under section 324 of this title, or if a trustee fails to qualify under section 322 of this title, then the court shall appoint one disinterested person to serve as trustee or examiner, as the case may be, in the case."

11 U.S.C. *Section 1141, Effect of confirmation,* provides as follows:

"(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security hoilder [sic], or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the

order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor.

(d)(1) Except as otherwise provided in this subsection, in the plan, or in the other confirming the plan, the confirmation of a plan –

(A) discharges the debtor from any debt that arose before the date of such confirmation, and any debt of a kind specified in section 502(g), 502(h), or 502(i) of this title, whether or not –

(i) a proof of the claim based on such debt is filed or deemed filed under section 501 of this title;

(ii) such claim is allowed under section 502 of this title; or

(iii) the holder of such claim has accepted the plan; and

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

(2) The confirmation of a plan does not discharge an individual debtor from any debt excepted from discharge under section 523 of this title.

(3) The confirmation of a plan does not discharge a debtor if –

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

(4) The court may approve a written waiver of discharge executed by the debtor after the order for relief under this chapter."

11 U.S.C. Section 1142 provides as follows:

" (a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan."

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STATEMENT OF JURISDICTION

Appellant contemnor takes this appeal, as a matter of right, pursuant to 28 U.S.C. Section 158(d), providing that a court of appeals shall have jurisdiction to hear appeals from final orders of the district court entered in cases and proceedings referred to a bankruptcy judge under 28 U.S.C. Section 157.

The threshold appellate questions in this case require this court to determine certain jurisdictional facts upon which the district court based its order in a civil contempt proceeding granting remedial relief to the "liquidating trustee."

The jurisdictional facts which must be determined are (a) whether the Bank's plan is binding as the "Law of the Case" and the bankruptcy court has authority to enter orders necessary to enforce an unlawful plan; and (b) whether a bankruptcy court has statutory authority to appoint a "liquidating trustee," receiver, or assignee vested with title of an individual debtor's estate *after* confirmation *without* having satisfied the requirements of 11 U.S.C. Section 1104(a)(2).

The most important question in this appeal concerns whether this Court in the exercise of its supervisory control of the courts below will sanction conduct which is on its face *inconsistent* with its mandate in various opinions and allow the attorney for the "liquidating trustee" to take one position in this Court and a diametrically opposed position in the "Tax Case" before the United States Supreme Court.

STATEMENT OF ISSUES

1. Whether the district court erred in concluding that the Bank's plan is binding and the "Law of the Case" in exercising its contempt power to grant remedial relief to the "liquidating trustee" requiring Theodore B. Gould to turn over $66,500 derived from the sale of property *after* confirmation.

2. Whether the district court erred in requiring the turnover to the "liquidating trustee" of taxable income earned *after* confirmation and *not* specifically enumerated as means for the plan's implementation.

3. Whether the district court's affirmance of the bankruptcy court's order of civil contempt, and the imposition of punitive sanctions of a daily fine of $1,000, without a determination of what factors the court considered in imposing the sanctions, was a violation of due process of law and the Excess Fines Clause.

STATEMENT OF THE CASE

This case was initiated in the bankruptcy court below upon the filing, by Herbert Stettin, Esq., on behalf of Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, of a motion for contempt, App. *18a*, alleging that the proceeds of Theodore B. Gould's sale of certain concrete pumps were property of the Miami Center Liquidating Trust on the grounds that "the concrete pumps are the property of the Liquidating Trust,' App. *21a*, and thus, "Theodore B. Gould holds $67,500 that belongs to the Liquidating Trust and should be required to pay over

these sums immediately." App. *21a*. The contempt motion alleged that

> "Mr. Gould was well aware of *the ownership interest of the Liquidating Trust in this property* and chose to dispose of the property for the express purpose of receiving the proceeds therefrom." (Emphasis added) App. *21a*.

The motion also alleged as follows:

> "His receipt of these monies is a willful and deliverate attempt to interfere in the operation of the Liquidating Trust. It is the latest in a series of acts designed to disobey this Court's others,[5] frustrate the Liquidating Trustee from completing his responsibilities under the terms of the plan, and is *a violation of the Bankruptcy*

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[5] Reference is to Theodore B. Gould's failure to comply with orders of the bankruptcy court directing the dismissal of lawsuits brought by Twin Development Corporation, Orion Mechanical Services, Orion Cleaning Services, Whitehall Security Corporation, and Holywell Management of Washington, Inc., against Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust, for his acts and transactions as the alleged shareholder of these corporations, having possession of substantially all of their assets and failing to discharge requirements of applicable State laws to pay or discharge their liabilities, including federal and state income taxes, prior to the issuance of a dividend. See also 28 U.S.C. Section 960, which provides that "any officers of agents conducting any business under authority of the United States Court shall be subject to all federal, state and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation." The bankruptcy court's orders certifying contempt to the district court are the subject of a pending appeal in this Court in Case Nos. 90-6019 and 91-5472.

Code and his contractual responsibilities." (Emphasis added) App. *21a.*

On August 1, 1989, the bankruptcy court entered an order, drafted by Herbert Stettin, and without revision or circulation,[6] based upon the statement that the parties

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[6] As in the Tax Case now being heard by the United States Supreme Court, Bankruptcy Judge Weaver, as a common practice, has abandoned his duty to find the facts *specially* in accordance with the Federal Rules of Civil Procedure, Rule 52(a), and instructed Mr. Stettin to prepare the findings of fact certifying contempt.

Mr. Stettin's lack of independence of the bankruptcy court and his adversarial relationship to the debtors as attorney for the "liquidating trustee" illustrates one of the principal reasons Congress prohibited a bankruptcy court from exercising its equitable powers to appoint a "receiver" in a bankruptcy proceedings. See *11 U.S.C. Section 105(b)*; H.R. Rep. No. 595, 95th Cong., 1st Sess. 316 (1977); S. Rep. No. 989, 95th Cong., 2nd Sess. 29 (1978). Yet at nearly every turn, Mr. Stettin has been treated by the Bankruptcy Judge as an extension of the court itself. As an example of the abuses of the judicial process arising from Bankruptcy Judge Weaver's abandonment of his duty to satisfy the requirements of Rule 52, on April 11, 1988, Bankruptcy Judge Weaver informed the parties in the Tax Case as follows:

> "This was a declaratory request seeking liability of the Liquidating Trustee and that only and I confined it to that. This is not the time to argue or discuss the case. *It is my procedure to bring everyone together by conference call and have somebody draw the Order.* If you don't like it, you have appellate remedies. (Emphasis added)
>
> I find for the Trustee. He is not responsible to file or pay taxes of Holywell or Gould and I am basing my decision, and asking Mr. Stettin to draw the Order, on the reason found in the *Sonner* case, the grantor trustee declaratory. By virtue of the fact that this is a declaratory on behalf of Trustee, *I am making no*

had agreed to a "stipulated set of facts," App. 23*a*,[7] held as follows:

> "1. In October 1981, THEODORE B. GOULD purchased certain concrete pumps and related equipment. *Upon the filing of his Chapter 11 proceeding in 1984, the concrete pumps and related equipment became property of his estate pursuant to 11 U.S. Code, Section 541(a).* Thereafter, pursuant to the terms of the confirmed Plan of Reorganization, *the concrete pumps and related equipment became the property of the MIAMI CENTER LIQUIDATING TRUST.* (Emphasis added)

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decision on liability of Bank of New York, Gould or Holywell and it can be decided if it is brought by the taxing authorities in a court of another forum outside the bankruptcy court." (Emphasis added) [now U.S. Bankruptcy Judge Robert A. Mark's verbatim notes.]

Thereafter, Mr. Stettin drafted the bankruptcy court's Findings Of Fact And Conclusions Of LAw, entered on April 28, 1988, and *without* circulating the draft to the parties, improperly submitted findings of fact and conclusions of law to the bankruptcy court that Holywell Corporation and Theodore B. Gould were liable for the payment of taxes arising from the Trustee's sale of the Miami Center in accordance with the provisions of the Bank's plan. The bankruptcy court held that the debtors were responsible for the payment of the income taxes, notwithstanding the fact that the Complaint For Declaratory Relief alleged *only* that the Bank of New York was liable for the payment of such taxes and made no allegation against the debtors.

[7] There has been no stipulation of facts. The only facts upon which the parties involved agree are (a) that Theodore B. Gould purchased the concrete pumps and related equipment in October 1981, and (b) that Theodore B. Gould sold the concrete pumps and related equipment on June 2, 1989, to Lawrence G. McMillan for $67,500. App. 33*a*.

2. . . . *Before the sale was consummated, MR. GOULD was notified [that] the Liquidating Trust claimed the right to receive the sale proceeds.*[8] MR. GOULD refused to allow the sale proceeds to be paid to the Liquidating Trustee and insisted the contract for the sale of the concrete pumps and related equipment be made in his name, and that payment for the concrete pumps and related equipment be paid to him.

. . .

4. *The funds are presently held by MR. GOULD in his name at a brokerage firm*[9] and have been

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[8] The sale of the concrete pumps and related equipment was negotiated on May 30, 1989. A contract was drafted and the arrangements for payment upon delivery with a Cashier's Check were made on May 31, 1989. The terms of the contract were completed on June 1, 1989. The following day, on June 2, 1989, Mr. Gould was informed that Mr. McMillan's attorney had contacted Fred Stanton Smith and proposed establishing an escrow. The proposed modification of the contract was rejected. On the same day, Mr. Gould informed Mr. Smith, after reviewing the terms of the sale of the concrete pumps, that no additional funds would be paid to the Trust since the bankruptcy court had held that the "liquidating trustee" was not responsible for the payment of federal and state income taxes. Mr. Smith made no demand that the Miami Center Liquidating Trust "claimed the right to receive the sale proceeds."

[9] No representation or testimony was made to any court that the funds derived from the sale of the concrete pumps were held at a "brokerage firm." See *Deposition Of Theodore Gould*, July 19, 1989:

MR. STETTIN: "Where is the $67,500 less the $1,000, presently?"

MR. GOULD: "Invested in GMAC 30-day paper at 9.21% interest."

> invested in short-term commercial paper. Mr. GOULD refuses to reveal the brokerage firm, refuses to turn the money over to the Trustee and has stated he will not obey any order of this Court to do so." (Emphasis added)

Thereupon, the bankruptcy court entered an Order requiring Theodore B. Gould to turn over the net sale proceeds of $66,500, plus earned interest, to the "liquidating trustee" on July 31, 1989, and in the event that the funds were not turned over, the Court imposed a daily fine of $1,000 upon Theodore B. Gould, citing *United Mine Workers of America*, 330 U.S. 258, 67 S.Ct. 677, 91 L.Ed. 884 (1987), and *In re Chase & Sanborn Corp.*, 872 F.2d 297 (11th Cir. 1989), for the conclusion that:

> " . . . *the imposition of this fine is a reasonable and necessary means of enforcing this Order,* given the persistent and deliberate refusal of the Defendant, THEODORE B. GOULD to obey the Order of this Court and the frustration of the Liquidating Trustee's ability to perform his functions as Trustee [citation omitted]." (Emphasis added) App. 25*a*.

MR. STETTIN: "In whose name is the account held?"
MR. GOULD: "In my name."
MR. STETTIN: "At which brokerage firm?"
MR. GOULD: "At this stage . . . I don't think you have any business knowing, since my position is that you represent the trustee who has been unlawfully appointed for the purpose of avoiding the payment of taxes. I am not going to tell you." App. 40*a*.

The bankruptcy court's finding was based upon Mr. Stettin's erroneous assumption and is another illustration of the abuses arising from Bankruptcy Judge Weaver's practice of having Mr. Stettin draft the court's orders.

The Court also held in addition to the daily fine of $1,000 that in the event the monies were not turned over by August 4, 1989:

> " . . . the Court further finds and certifies to the United States District Court that THEODORE B. GOULD is in contempt of this Court and its Orders by his failure and refusal to comply with its Orders concerning payment of monies to the Trustee. *THEODORE B. GOULD should be punished by the continued imposition of the fine set out in this Order and by a period of incarceration not to exceed ten (10) days* (or until compliance, whichever first occurs)." (Emphasis added) App. *25a*

> "9. The Court further finds and determines this certification is for a contempt committed both under Rule 9020(a) and (b) of the Rules of Bankruptcy Procedure in that THEODORE B. GOULD was in the presence of the Court and was ordered to comply by the Court on July 27, 1989, and has announced his intention not to do so."

On August 14, 1989, the bankruptcy court entered an order certifying Theodore B. Gould in contempt to the district court on the grounds that the contemnor refused to comply with its prior order dated August 1, 1989. App. *27a*.

Timely objections were filed to the bankruptcy court's order of contempt, App. *44a*, pursuant to Bankruptcy Rules 9020 and 9033 for the purpose of obtaining *de novo* review by the district court on the following specific grounds:

1. The Trustee has no interest in the property of Theodore B. Gould's bankruptcy estate, the subject concrete pumps or the proceeds from the sale of such pumps. App. *44a*.

2. The bankruptcy court lacked statutory authority to appoint a Trustee *after* confirmation and vest title to the property of Theodore B. Gould's estate in an agent of the court, relieving such trustee of the duty to discharge requirements of law, specifically, *inter alia*, the payment of federal and state income taxes. *Id.*

3. The creation of the Miami Center Liquidating Trust and the appointment of the "liquidating trustee" was for the unlawful purpose, *inter alia*, of *avoiding the payment of federal and state income taxes*. App. *48a*.

4. Theodore B. Gould has been discharged as an individual debtor in accordance with Section 1141, and cannot be required to perform duties under an *unlawful* contract to which he did not consent, App. *49a*, and Mr. Gould *denied* that he has any contractual responsibility to the "liquidating trustee" with respect to the plan's implementation by means forbidden by law, namely, the avoidance of federal and state income taxes. App. *50a*.

5. The value or sale proceeds of the concrete pumps was *not* specifically enumerated as an asset required for the plan's implementation, App. *51a*, and the various courts of appeal have adopted the general rule that the predicate of a bankruptcy court's jurisdiction is *possession* of property. App. *52a*.

6. The bankruptcy court's authority to hold Theodore B. Gould in contempt of court for discharging a

responsibility required by law and his fiduciary duty depends entirely upon whether the bankruptcy court's order "was in whole or in part beyond the power of the court . . . [and] was in excess of [its] jurisdiction. . . . " App. *53a*.

7. The contempt power of a court of the United States is limited and the bankruptcy court's imposition of punitive sanctions of a fine of $1,000 per day and the threat of imprisonment was in violation of the *Due Process Clause*. App. *55a*.

Mr. Stettin filed a "Response To Objections To Order Of Contempt," App. *59a*, on the following grounds:

> "The plan of reorganization, as confirmed, unequivocally states that all of the debtors' assets, as defined by Section 541(a) of the Bankruptcy Code, are assets of the Miami Center Liquidating Trust. Mr. Gould has already stipulated in open court that the pumps are 541(a) assets. That plan has been confirmed and is the law of the case. *See Holywell Corporation v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), *dismissed as moot sub nom, Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *certiorari denied*, ___ U.S. ___, 109 S.Ct. 69, 102 L.Ed. 2d 46 (1988). Mr. Gould's petition for writ of mandamus was also denied, *In re Theodore B. Gould*, ___ U.S. ___, 109 S.Ct. 198, ___ L.Ed. 2d ___ (1988). Mr. Gould's collateral attack on the plan should not be permitted." App. *59-60a*
>
> "Equally worth noting is Mr. Gould's assertion that the bankruptcy court lacks jurisdiction over him. Every court in which Mr. Gould has raised this issue has rejected it . . . " App. *60a*

"Mr. Gould further argues that reference to Mr. Smith as 'Liquidating Trustee' is a misnomer (Objections to Order of Contempt at 3, n. 1). This contention is specious. Even Mr. Gould's wholly-owned and controlled subsidiaries refer to the 'Liquidating Trustee' as such in five (5) lawsuits filed in the United States District Court for the Western District of Virginia."[10] App. *60a*

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[10] Although the Bank's plan limited the Trustee's powers and precluded changing the business of the debtors, Art. V. *Creation of Trust*, par. 3(x), his authority to use the cash of Holywell's wholly-owned corporate subsidiaries, engaged in business solely in the Commonwealth of Virginia, required acting as a "liquidating trustee," and *standing in the place* of the corporations as a "trustee in dissolution" for the purpose of collecting the assets of the corporations and the payment or discharge of their liabilities, including federal and state income taxes. See Treas. Reg. 1.6012-3(b)(4) (1960); Art. 547 of Treas. Reg. 45 (1920 ed.); Bkrtcy. S.D. Fla., *"Cash Collateral" Order*, December 31, 1984, C.P. No. 303, requiring the winding up of these corporations, and the determination and payment of their federal income taxes. See also *Twin Development Corporation v. Fred Stanton Smith, individually and as Trustee of the Miami Center Liquidating Trust, et al.*, (W.D. Val., Nov. 15, 1989):

> " . . . when all the capital stock of a corporation is controlled by one person or one entity, then *ultimate control of the corporation resides in that individual or entity, especially in terms of liquidation, satisfaction of debts, and distributions of net assets to the stockholders*, here, before bankruptcy, the Holywell Corporation. After Holywell listed that stock as an asset in the bankruptcy filing and after inclusion in the [Bank's] Plan of Reorganization, distribution of those net assets [after payment of liabilities and issuance of a dividend] must be in accordance with the Plan of Reorganization." (Emphasis added) *Memorandum Opinion*, p. 8.

> " . . . Mr. Gould goes on to misstate the holding of *California State Board of Equalization v. Sierra Summit, Inc.*, 57 U.S.L.W. 4639 (June 12, 1989), which has no applicability to the issues herein." App. *61a*,

Mr. Stettin's answer infers that the plain language of *28 U.S.C. Section 960* and its legislative history is not applicable to the "liquidating trustee."

> "Mr. Gould claims he 'cannot be required to perform duties under an unlawful contract to which he did not consent.' (Objection to Order of Contempt at 6). It is this statement which best exemplifies Mr. Gould's contemptuous conduct. *The plan is binding on him, regardless of his opinions as to the plan's validity, and regardless of whether he voted to accept it.* [citations omitted]" (Emphasis added) App. *61a*

> "Mr. Gould's claim that he can safely convert trust assets because the plan does not require the Liquidating trustee to pay income taxes defies all logic, *particularly where the Bankruptcy Court and the District Court have held the law imposes no duty on the Liquidating Trustee to file tax returns or pay federal income taxes under the facts of this case.*" (Emphasis added) App. *61-62a*

Contemnor filed a motion for stay on the bankruptcy court's contempt order, App. *140a*, on grounds, *inter alia*, that:

> "A stay is necessary because *this court has not considered the seriousness of the financial burden* imposed upon Theodore B. Gould by fixing the amount of $1,000 a day imposed as a means of assuring compliance with the bankruptcy court's order to turn over to an unlawfully

> appointed trustee the taxable income of $66,500 plus accrued interest without the provision for the payment of federal income taxes." (Emphasis added) App. *140a.*

The stay motion stated that the imposition of a daily sanction of $1,000 is *not* a reasonable fine, the bankruptcy court having taken possession and control of *all* of Theodore B. Gould's assets and deprived him of a source of income in the conduct of his business *after* confirmation of the Bank's plan. App. *148a.* Furthermore, there was no consideration of the amount of the defendant's financial resources and the seriousness of the burden to the defendant in fixing the amount of a fine to be imposed as a punishment or as a means of ensuring future compliance. See *United States v. United Mine Workers of America,* 330 U.S. 258, 303-304 (1946).

If Theodore B. Gould had turned over the sale proceeds plus interest income to the trustee without a provision for the payment of income taxes, he would have failed to discharge a duty imposed upon him by law, App. *151a,* the case would be *moot,* and an appellate court would have lacked jurisdiction to hear and resolve the controversy. See *In re Cordova Gonzalez,* 726 F.2d 16, 21 (1st Cir. 1984), *cert. denied,* 466 U.S. 951.

Mr. Stettin's objection to the Contemnor's stay motion was based upon the following grounds:

> " . . . Mr. Gould asserts the confirmed plan of reorganization does not bind him and thus he can divert trust property for personal gain. He is wrong. The plan of reorganization expressly provides that the Miami Center Liquidating Trust is funded by all of the debtors' assets, as

defined by 11 U.S.C. Section 541(a). *It cannot in good faith be disputed that the concrete pumps at issue were Mr. Gould's assets, as defined by Section 541(a) of the Bankruptcy Code. The concrete pumps were owned by him at the time he voluntarily sought protection in the Bankruptcy Court by filing his Chapter 11 petition. The pumps became assets of Mr. Gould's bankruptcy estate, and then became assets of the Miami Center Liquidating Trust upon confirmation of the plan. . . .* [citations omitted] The plan is the law of the case and binds Mr. Gould, regardless of whether he voted to accept it." (Emphasis added) App. *157a*

"The facts on which the certification of contempt is based are undisputed: *Mr. Gould sold assets belonging to the Miami Center Liquidating Trust (the concrete pumps) without permission from the Liquidating Trustee and pocketed the money.*" (Emphasis added) App. *158a*

"Mr Gould vehemently argues the $1,000 a day fine is excessive and that he has *no* source of funds from which he can pay. Respectfully, Mr. Gould has employed the law firms of Stearns, Weaver et al. and Robert Musselman & Associates; presumably *pays the costs of the litigation and his many appeals;*[11] and regularly flies to

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[11] The record of the related proceedings in this case indicate that the "liquidating trustee" took possession of *$1,905,942.59* in cash on October 10, 1985, and accounts receivable secured by "super-priority" liens against MCLP's assets of *$2,575,713.96* plus accrued interest, of Theodore B. Gould's individual estate, and also received *$8,368,730.07* on March 20, 1991, on behalf of Theodore B. Gould's interest in the Miami Center Joint Venture, representing a total cash balance of *$12,917,318* as of July 31, 1991. Mr. Gould, however, was forced to borrow $2.5

> Miami from his home in Virginia for court appearances. *His assertion that he cannot afford a fine for wrongfully diverting $67,500 from the trust (where he has not even turned over those funds) belies credibility."* App. *158a*
>
> "A stay would imply that the debtors can use trust property to their own benefit at will, without fear of retribution." App. *159a*
>
> "The public interest will be harmed if the court grants the motion for stay. The public has the right to certainty of the law. *Mr. Gould, in diverting trust assets for personal gain, has deprived his legitimate creditors of a lawful source of repayment. All creditors should be wary of a system that would let such conduct go unchecked."*[12] (Emphasis added) App. *160a*

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million from August 1, 1987, to July 31, 1991, to pay attorneys' fees and accounting expenses arising from the Trustee's commingling of the assets of the various fiduciary estates in his custody.

As of July 31, 1991, outstanding unpaid attorneys' fees are $*407,000* to Arnold & Porter and $*67,000* to Robert M. Muselman.

The attorneys' fees and accounting expenses were principally related to the controversies concerning the source of funds and a determination of the amount of the tax liabilities payable to the United States, Florida, and Virginia, during the period that the property of Holywell Corporation and Theodore B. Gould has been in the Trustee's possession.

[12] The Miami Center Liquidating Trust is a *creditors'* trust. It is undisputed that Fred Stanton Smith, as Trustee of the Miami Center Liquidating Trust, represents *only* the creditors, and is a receiver acting on the bankruptcy court's behalf. Mr. Stettin has conceded in this proceeding that the "liquidating trustee" does *not* represent, and his interest are *adverse* to, the interests of Holywell Corporation and Theodore B. Gould.

In reply to Mr. Stettin's response to the contemnor's objections to the bankruptcy court's contempt order, the appellant again raised the jurisdictional question of whether the district court, or the bankruptcy court below, had jurisdiction to undertake by the process of contempt to punish a person for refusing to comply with an order which that court had no authority to make, App. *66a*, and citing numerous decisions of various courts of appeal and the Supreme Court, argued that the burden was upon the "liquidating trustee" to establish the facts essential to show that the bankruptcy court had jurisdiction *after* confirmation over Theodore B. Gould's conduct as a discharged debtor. App. *66a*.

The second question which the district court had to resolve was whether the provisions of the Bank's plan could be construed to grant authority to the "liquidating trustee" to receive post-confirmation income on behalf of

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Also, it is undisputed that MCLP's general unsecured creditors negotiated a pre-confirmation amendment to the Bank's plan, providing for the payment of the principal of undisputed claims no more than 45 days after the plan's Effective Date, and interest 90 days after the payment of the principal, limiting to $2,000,000 the cash payable to creditors with a *superior* priority and making no provision for the payment of federal and state income taxes. [C.P. No. 614]

Notwithstanding the plan's provisions and the applicable bankruptcy statutes, $3,281,288.12 has been paid as post-confirmation administrative expenses to the Trustee, his attorneys, accountants, and tax specialists; interest in the amount of $1,679,603.10 has been paid to general unsecured creditors; and the "liquidating trustee" has filed claims for the payment of interest in the amount of $1,537,751 on behalf of unsecured creditors, his attorneys, accountants, and his own account as of March 31, 1991.

the individual debtor's estate as a receiver and use such funds for the payment of timely filed allowed claims or the Trust's administrative expenses. App. *68a*. In other words, the question presented to the district court was what assets were revested in the discharged debtor upon confirmation, and specifically whether the concrete pumps, owned by Theodore B. Gould prior to the filing date, were vested in the "liquidating trustee" as an assignee upon the Effective Date. App. *70a*.

On May 17, 1991, the district court entered an order directing Theodore B. Gould to comply with the bankruptcy court's turnover within seven (7) days and held that the failure to comply "shall result in the imposition of sanctions, including but not limited to a daily fine in the amount of $1,000 per day for each day Mr. Gould shall fail to comply." App. *170a*

The district court's imposition of punitive sanctions was based upon the following analysis of the proceedings below:

> "Under the bankruptcy court's August 1, 1989 Order Finding Theodore B. Gould in Contempt, Mr. Gould was required to turn over net proceeds from the sale of trust property. If Mr. Gould failed to comply by August 4, 1989, a $1000/day fine was to be imposed until the proceeds were turned over. The bankruptcy court further found Mr. Gould to be in violation of its Order and concluded that Mr. Gould should also be punished by a period of incarceration not to exceed ten (10) days. Moreover, *the bankruptcy court concluded that Mr. Gould was found to be in criminal contempt in that Mr. Gould's failure to comply with the court's orders was done in*

the presence of the court, and that Gould announced his intention not to comply. Funds from the sale are presently held by Mr. Gould in his name at a brokerage firm and have been invested in short-term commercial paper, according to Mr. Gould. He refuses to reveal the brokerage firm and refuses to turn the money over to the Trustee. He has stated he will not obey any order of the bankruptcy court to do so. *Id.*" (Emphasis added)

Judge Marcus' conclusions of law in resolving the issues before the Court were as follows:

1. *The Bankruptcy Court Has Post-Confirmation Jurisdiction Over Theodore B. Gould's Conduct Under The Bank's Plan Which Is Binding Upon Mr. Gould As "The Law Of The Case"*:

"Article XIV of the confirmed plan of reorganization explicitly provides that the bankruptcy court retains jurisdiction over Mr. Gould and his co-debtors in order to enter any order necessary or appropriate to enforce the plan. [f.n. omitted] The reorganization plan is confirmed and is the law of this case. *See Holywell Corp. v. Bank of New York*, 59 Bankr. 340 (S.D. Fla. 1986), *dismissed sub nom, Miami Center Liquidating Trust v. Bank of New York*, 838 F.2d 1547 (11th cir.), *cert. denied*, 488 U.S. 823, 109 S.Ct. 69, 102 L.Ed. 2d 46 (1988). The plan is binding upon Mr. Gould, pursuant to 11 U.S.C. Section 1142." App. *165a*

2. *The Miami Center Liquidating Trust Owns The Concrete Pumps*:

" . . . the reorganization plan as confirmed states clearly and unambiguously that *all* of the debtors' assets, as defined by Section 541(a) of the Bankruptcy Code, [f.n. omitted] are assets of

the Miami Center Liquidating Trust. *See* Article V of the plan. [f.n. omitted] The concrete pumps are Section 541(a) assets and the plan's provisions are binding. *See* 11 U.S.C. Section 1142." App. *165-66a*

3. *The Bankruptcy Code Provides Statutory Authority For The Appointment Of The Trustee Of The Miami Center Liquidating Trust To Implement The Bank's Plan*:

"Article V of the plan, however, provides specifically for the appointment of a trustee of the Miami Center Liquidating Trust to implement the plan. [f.n. omitted] Mr. Gould's attempt to appeal the plan was not successful. *See Holywell v. Bank of New York*, 59 Bankr. 340. The Liquidating Trustee was appointed by order dated August 12, 1985; that order was not appealed by Mr. Gould or anyone else." App. *166-67a*

4. *The Liquidating Trustee Is Not Responsible For The Payment Of Income Taxes On The Taxable Income Received On Behalf Of Theodore B. Gould's Estate*:

"The question of whether the Trust must pay taxes is *not relevant to the issue of ownership* of the concrete pumps. Moreover, the Eleventh Circuit Court of Appeals has determined that the Trust does not have the tax obligations Mr. Gould seeks to impose. *See In re Holywell*, 911 F.2d 5071 (sic) (11th Cir. 1990)." (Emphasis added) App. *167a*

Although the application of Bankruptcy Rule 9020 concerns criminal contempt proceedings the district court stated that "We take no position at this time of a criminal

contempt finding with respect to Mr. Gould." *Order*, p. 8, note 6, App. *169a*.

Contemnor filed a Motion For Rehearing informing the court that it was no longer possible to comply with the turnover order "since all of these funds have been used for the payment of attorneys' fees to Arnold & Porter, the debtor's counsel, in the proceedings for filing a petition for writ of certiorari concerning the Eleventh Circuit's divided opinion, cited as *In re Holywe11 Corp.*, 911 F.2d 1539 (11th Cir. 1990)," App. *171a*, on the following grounds:

First. The court's conclusion that "all of the debtors' assets . . . are assets of the Miami Center Liquidating Trust," and this Court's decision that "the reorganized debtor, not the Liquidating Trustee is responsible for . . . [the payment of] taxes," *In re Holywell*, 911 F.2d at 1545, raises the question, what will be the source of funds for the payment of taxes? App. *172-73a*

Second. Since the court has held that the "liquidating trustee" has been assigned title to all of the debtors' assets, either the "liquidating trustee" is an *assignee* of Theodore B. Gould's property and responsible for the payment of income taxes, or the historical precedent of the United States Supreme Court precludes the transfer of such property. App. *173a*. Thus, the district court's Contempt Order is *inconsistent* on its face with this Court's Tax Opinion.

Third. The opposition briefs filed by Mr. Stettin on the trustee's behalf in the United States Supreme Court are *inconsistent* with the position that the "1iquidating trustee" owns the concrete pumps and has the "strong-

arm" authority to void a preferential or fraudulent transfer under Bankruptcy Code Sections 547 and 548, App. *174a*, or is entitled to the sale proceeds.

Fourth. 11 U.S.C. Section 105 sets forth the scope of authority granted to a bankruptcy judge within the parameters defined in 28 U.S.C. Section 157. 11 U.S.C. Section 1104(a)(2) provides for the appointment of a trustee in a case under title 11 in the "interests of creditors, any equity security holders, and other interests of the estate" ("Best Interests Standard") *prior* to confirmation of a plan, and Section 105(b) *prohibits* a bankruptcy court from appointing a receiver in a case under title 11 or to act under title 11.

Fifth. The courts will not enforce contracts which are *unlawful*, injurious to the interests of the State, or inconsistent with public policy. The question of whether the bankruptcy court had statutory authority to appoint a receiver under the provisions of a plan is of a jurisdictional nature, and thus, the Eleventh Circuit's "mootness" ruling, 838 F.2d 1547 (11th Cir. 1988), is not applicable. App. *177a. 11 U.S.C. Section 1129(a)(5)* precludes a court from confirmation of a plan if the manner of selection of a trustee under such a plan is inconsistent with "the interests of creditors and equity security holders and with public policy." App. *176a*

Sixth. The provisions of a plan cannot provide the basis for a bankruptcy court's reservation of jurisdiction. 28 U.S.C. Section 157 defines the jurisdiction of a bankruptcy judge. The bankruptcy court cannot exercise jurisdiction after administration of the estate has ended, *28 U.S.C. Section 157(b)(2)(A)*. App. *178a*

Seventh. The Bank's plan is *not* the "Law of the Case." The Bank's plan did not comply with the enumerated requirements of 11 U.S.C. Section 1129(a), and did not satisfy the Fair and Equitable Standard, *In re Holywell Corp.*, 913 F.2d 873, 879 (11th Cir. 1990). App. *178a*

The failure of the Bank's plan to provide for the payment of federal and state income taxes precludes the conclusion that the bankruptcy court had authority to confirm such a plan, *United States v. Key*, 90 S.Ct. 1049, 1052 (1970). The plan failed to satisfy the Fair and Equitable Standard since the Bank's plan did not provide for the express statutory priority granted to the United States. App. *179a*.

Separately, the Contemnor filed a Stay Motion, App. *216a*, and a motion for granting judicial notice to the proceedings in the "Tax Case," App. *221a*.

The Contemnor's Stay Motion requested a stay of the district court's Contempt Order pending disposition of the writ of certiorari issued by the United States Supreme Court in the "Tax Case" on the grounds that the Court's mandate would be dispositive in these contempt proceedings: If the Court holds that Mr. Smith is a "trustee in a case under title 11" and "acting under title 11," then the exception in 31 U.S.C. Section 3713, granting absolute priority to the claims of the United States, would be applicable, and thus, Mr. Smith could not be held *personally liable* for such conduct. If, however, Mr. Smith is a "trustee in a case under title 11" and is "acting under title 11," this Court's divided opinion must be *reversed* and 26 U.S.C. Section 6012(b)(3) and (4) will impose a statutory duty upon the "liquidating trustee" to make the returns

for Holywell and Theodore B. Gould's individual estate. Furthermore, 26 U.S.C. Section 6151(a) will impose a duty upon the "liquidating trustee" to pay the income taxes in accordance with the statutory priority granted in 11 U.S.C. Section 503. Since it is undisputed that the Bank's plan did *not* provide adequate means to pay claims with a priority superior to the claims of MCLP's unsecured creditors, the Bank's plan did *not* satisfy the Fair and Equitable Standard which incorporates the Absolute Priority Doctrine and thus, must be construed as *null and void.* Alternatively, Mr. Smith is *not* a "trustee in a case under title 11," and thus, was not "acting under title 11," because the administration of the estate ended. *Ergo,* the Priority Statute's exception is *not* applicable and Mr. Smith will be held personally liable for the payment of the income taxes of the fiduciary estates in his custody, having breached his fiduciary duty. App. *173a.*

The Contemnor's Stay Motion was based upon the construction of the priority defined in title 11 and the Priority Statute as a universe of discourse with mutually exclusive alternatives which must be construed *in pari materia.*

The Contemnor's Motion For Granting Judicial Notice requested that the district court grant judicial notice to the trustee's testimony in the "Tax Case." App. *221a.* Mr. Smith testified that he did *not* have control of any property and held title *only* to the money of the consolidated debtors. App. *221a.* Mr. Stettin also *stipulated* that Article IV, *Means For Execution Of The [Bank's] Plan,* specifically enumerated *all* of the assets available for the payment of claims against the debtors' estates. App. *222a.*

On June 25, 1991, the district court entered an order *denying* the Contemnor's Stay Motion, *denying* the Contemnor's rehearing motion, and *granted* the motion for judicial notice. App. *232a*. The court below concluded that the "tax issue . . . lies outside the focus of the instant action . . . " on the grounds that " '[t]he question of *whether the Trust must pay taxes is not relevant to the issue of ownership* of the concrete pumps.' " (Emphasis added) App. *233a*. The district court held that its Contempt Order was premised on the fact that " 'Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds, without the consent of the Liquidating Trustee and in direct violation of a court order.' " App. *234a*.

A timely notice of appeal was filed to this Court on July 1, 1991, and thereafter Mr. Stettin filed a motion to the district court below requesting a money judgment in the amount of $730,000 as of August 10, 1991, against the Contemnor, based upon a daily fine of $1,000 from August 1, 1989, and that the court below reserve jurisdiction to consider imposing a punishment of imprisonment. App. *238a*.

Appellant objected to Mr. Stettin's motion for a $730,000 money judgment and his request that the district court below reserve jurisdiction to consider punishment of imprisonment, App. *241a*, on the following grounds:

1. The district court's order, entered on May 17, 1991, satisfied the criteria for the finality of a civil contempt order – sanctions had been imposed, and thus, the filing of a notice of appeal divested the court of jurisdiction over the matters appealed. App. *242a*.

2. The district court's order denying the Appellant's motion for a stay pending disposition of the "Tax Case" held that a stay of its Contempt Order required posting a supersedeas bond in the amount of $66,000 plus twice the statutory rate of interest from May 17, 1991. Yet Mr. Stettin seeks a money judgment of $730,000. App. 243a.

3. A punitive fine of $1,000 per day is a violation of the Excess Fines Clause, App. 250a, and the district court's failure to explain the factors considered in imposing such a sanction is a violation of due process of law and reversible error. App. 245a

4. The inability to comply is a complete defense to civil contempt. App. 246a.

5. The district court's Contempt Order is an abuse of judicial power since punishment by imprisonment for an act which cannot be undone is solely punitive in character. App. 247a.

6. The imposition of a fine of $1,000 per day or imprisonment as sanctions to punish past conduct, not to secure prospective compliance, is a violation of the Fifth Amendment's *Due Process Clause* and the Eighth Amendment's *Excess Fines Clause*. App. 250a[13]

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[13] On September 20, 1991, Mr. Stettin filed a reply to the appellant's objections to the district court's consideration of his motion for a money judgment of $730,000 and request that the court enter an order reserving jurisdiction to consider punishment by imprisonment. App. 241a.

SUMMARY OF ARGUMENT

1. The provisions of the Bank of New York's plan cannot be construed as the "Law of the Case" and binding upon Theodore B. Gould for the purpose of granting authority to the bankruptcy court to enter orders enforcing an unlawful plan.

2. The Fairness Standard requires specific enumeration of the assets for the payment of specific liabilities and a determination of adequate means for a plan's implementation. Assets *not* specifically enumerated as means for a plan's implementation revest as an effect of confirmation and income earned *after* confirmation is released from all claims and interests of creditors.

3. The bankruptcy court lacked power to appoint a trustee as an assignee for the benefit of creditors *after* confirmation under the provisions of the Bank's plan without satisfying the statutory requirements of title 11.

4. The district court's affirmance of the bankruptcy court's order of contempt and the imposition of punitive sanctions of a daily fine of $1,000 was a violation of the Due Process Clause and the Excessive Fines Clause of the Constitution.

Introduction

This appeal must be considered within the perspective of the conduct of related proceedings in this bankruptcy case for the following reasons:

First. The Bank's plan was confirmed *without* a confirmation hearing being held on objections to the Bank's

amended consolidated plan.[14] No hearing was held to determine whether the Bank's plan satisfied the enumerated requirements of 11 U.S.C. Section 1129(a).[15] No hearing was held to determine whether the Bank's plan satisfied the Feasibility Standard. No hearing was held to determine whether the Bank's plan satisfied the Fair and Equitable Standard, providing for the distribution of

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[14] Compare 11 U.S.C. Section 1128(a); see *Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. Bank of New York (In re Holywell)*, S.D. Fla., No. 85-3230-Civ-CCA, June 30, 1986: "No confirmation hearing was held on objections to the Bank's plan. . . . " Compare *National Surety Co. v. Coriell (Brandeis)*, 289 U.S. 426, 435 (1933): "[T]he decree approving the plan should have been reversed in its entirety because the procedure pursued by the District Court was improper. First. The nonassenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based on adequate data. . . . Second. Every important determination by the court in receivership proceedings calls for an informed, independent judgment. . . . "; also *In re Acequia*, 787 F.2d 1352, 1358 (9th Cir. 1986), citing *Technical Color & Chemical Works, Inc. v. Two Guys From Massapequa, Inc.*, 327 F.2d 737, 742 (2nd Cir. 1964): "The Bankruptcy Court must hold an evidentiary hearing in ruling on confirmation." See also Bankruptcy Rule 3020(b)(2), "The court shall rule on confirmation of the plan *after* notice and hearing as provided in Rule 2002. . . . " (Emphasis added)

[15] See *In re Martin*, 66 B.R. 921, 925 (Bkrtcy. D. Mont. 1986) (Section 1129 imposes upon a bankruptcy court the responsibility and duty to determine whether each of the eleven enumerated requirements of subsection (a) have been met), *In re Holthoff*, 58 B.R. 216, 218 (Bkrtcy. E.D. Ark. 1985), *In re Coastal Equities, Inc.*, 33 B.R. 898 (Bkrtcy. S.D. Cal. 1983), citing H.R. Rep. 95-595, 95th Cong. 1st Sess 977 at 412.

property of the various debtors' estates in accordance with the Absolute Priority Doctrine.[16]

Second. The debtors' appeal of the bankruptcy court's order confirming the Bank's plan was dismissed and appellate review on the merits was denied, deference under the "clearly erroneous" standard of review having been granted to the bankruptcy court's adoption *in toto* of the Bank's proposed findings of fact[17] and conclusions of law, based upon a common law rule for the application of the Mootness Standard,[18] *Miami Center Limited Partnership*

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[16] [N]o hearing was held regarding debtors' and OBY[sic]/MCJV's objection that the Bank's plan was *not* fair and equitable." (Emphasis added) *Olympia & York Florida Equity Corp. and Miami Center Joint Venture v. Bank of New York, supra.*

[17] Compare *Fed. Rules Civ. P., Rule 52(a)*: "In all actions tried upon the facts without a jury . . . *the court shall find the facts specially and state separately its conclusions of law thereon. . . .*" (Emphasis added) See *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948); *United States v. El Paso Natural Gas Co.* 376 U.S. 651, 656 (1964), quoting Circuit Judge J. Skelly Wright ("Rule 52 says the court shall prepare the facts. . . . Many courts simply decide the case in favor of the plaintiff or defendant, have them prepare the findings of fact and conclusions of law and sign them. . . . *This is an abandonment of the duty and the trust that has been placed in the judge by these rules.* It is a noncompliance with Rule 52 specially and it betrays the primary purpose of Rule 52 – *the primary purpose being that the preparation of these findings by the judge* shall assist in the adjudication of the lawsuit." (Emphasis added)

[18] See *Alton & So. Ry. Co. v. International Ass'n of Mach. & A.W.*, 463 F.2d 872, 877 (1972) (Cir. J. Leventhal): "[T]he constitutional power of a court to decide a contention presented on appeal does not define a constitutional duty. *There is latitude in appellate courts to develop doctrines of judicial administration that permit a court to decline decision,* though not precluded by a

v. The Bank of New York ("*Miami Center*"), 838 F.2d 1547, 1551 (11th Cir. 1988), note 4, "premised upon considerations of finality . . . ," *Miami Center*, 838 F.2d at 1553, and "the important policy of bankruptcy law that court approved reorganization plans be able to go forward based on court approval unless a stay is obtained." *Miami Center* at 1555.

Third. Another panel of this Court, in a different appeal, found that the Bank's plan did *not* comply with the applicable provisions of title 11, namely Section 1122, and discriminated unfairly against the Miami Center Joint Venture, a creditor who was impaired under, and had not accepted, the plan, and thus, affirmed *reversal* of the bankruptcy court's order of confirmation. *In re Holywell Corp.* (MCJV), 913 F.2d 873 (11th Cir. 1990).

Fourth. As of August 31, 1991, the Trustee of the Miami Center Liquidating Trust has received *$18,709,241.03* of income earned on behalf of the fiduciary estates in his custody after the plan's Effective Date, of

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jurisdictional bar from consideration of the matter. . . . " (Emphasis added) Compare 28 U.S.C. Section 158(d); also *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 15 (1983), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). In the absence of the application of the constitutional mootness doctrine requiring the federal courts to decide only "cases or controversies" or statutory preclusion of the issues in the administration of the bankruptcy laws [e.g., 11 U.S.C. Sections 363(m) and 364(e)], "the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.' " Accord *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415 (1964); *McClellan v. Carland*, 217 U.S. 268, 282 (1910); *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821).

which $13,001,556 was received on behalf of Theodore B. Gould *without* payment or establishment of a reserve for federal and state income taxes.

Fifth. A divided panel of this Court has held, concerning the duty of the "liquidating trustee" as the bankruptcy court's agent to pay income taxes on behalf of Holywell Corporation and Theodore B. Gould, in relevant part, as follows:

> "The Plan required consolidation of the debtors' estates, establishment of a liquidating trust, and appointment of a liquidating trustee. [footnote omitted] *The Plan was funded by all the debtors' assets.* as defined in section 541(a) of the Bankruptcy Code, *including proceeds from the pre-confirmation sale* of certain of Holywell Corporation's properties (hereinafter the 'Washington Properties') and *the anticipated post-confirmation sale* of the Miami Center property. The Plan had no express provision requiring the liquidating trustee to either file tax returns or pay income taxes." (Emphasis added) *In re Holywell Corp.*, ("Tax Case"), 911 F.2d 1539, 1542 (11th Cir. 1990)

Nevertheless, the panel's majority concluded that the individual appointed by the bankruptcy court and assigned title to an insolvent debtor's property[19] in accordance with the provisions of the Bank's plan was *not* "a

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[19] Compare *Bramwell v. United States Fidelity & Guaranty Co.*, 269 U.S. 483, 488 (1926), citing *Beaston v. Farmers*, 37 U.S. (12 Pet.) 102, 133-34 (1838) [Whenever a debtor is divested of his property, the person who becomes vested with the title is "made a trustee for the United States, and is bound to pay their debt first out of the proceeds of the debtor's property."] See also *King v. United States*, 85 S.Ct. 427, 431 (1964) "Whether or not [a

trustee in a case under title 11" or an "assignee," and thus, held that "neither the provisions of the Plan nor the statutory provisions obligate the liquidating trustee to file income tax returns or pay taxes." *Tax Case* at 1546[20]

The same panel held that the *Miami Center's* common law Mootness Standard, defined in *Miami Center,* required that the court conclude that the "the allegation concerning the propriety of the bankruptcy court's approval of a plan which makes no express provision for income taxes is an attempt to alter or modify the plan and is therefore barred. . . . " *Id.* Thus, notwithstanding the uniform precedent of the Supreme Court that a bankruptcy court has the duty to assure itself, in confirming a plan, that adequate funds are provided for the payment of taxes to discharge the absolute statutory priority of the United States, see *United States v. Key,* 90 S.Ct.. 1049 (1970),[21] this

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disbursing agent] falls within the category of fiduciaries on whom such responsibility [the payment of income taxes to the United States] should be placed depends, not on the title of his position or the mode of his appointment, but, in practical terms, upon the degree of control he is in a position to assert over the allocation among creditors of the debtor's assets in his possession."

[20] This Court's opinion is pending a Writ of Certiorari before the United States Supreme Court granted to the debtors in Case No. 90-1361 and to the United States in Case No. 90-1484.

[21] "This court has long held that these words, along with the words 'fair and equitable' . . . in no way authorize a district court to erode priorities otherwise granted by law, and it follows that this language cannot be taken to exclude by implication an explicit statutory priority, such as that granted the United States. . . . " *90 S.Ct. at 1052.*

Court held that its Mootness Standard precluded appellate review on the merits of the bankruptcy court's authority to confirm a plan which did not provide for the payment of federal and state income taxes arising from the income earned by the fiduciary estates in the Trustee's custody.

The Internal Revenue Service has conducted a field audit and issued a Final Report (draft) computing the federal income taxes payable on behalf of Holywell Corporation and its subsidiaries on a consolidated basis for the fiscal year ended July 31, 1986 as *$19,144,938*. The Commonwealth of Virginia's Department of Taxation has issued a Final Report and Notices of Assessment for the fiscal years ended July 31, 1985 and July 31, 1986, in the amounts of *$946,903.02* and $901,845.72, respectively, (excluding penalties and interest). The State of Florida's Department of Revenue has issued tentative corporate income and intangible tax liabilities in the amount of *$2,605,548* of the subsidiary corporations of Holywell Corporation engaged in business in Florida and in the control of the "liquidating trustee."

Sixth. Another panel of this Court, applying the *Miami Center's* common law Mootness Standard, sanctioned the modification of the contractual rate of interest in the bankruptcy court's determination of the loan amount secured by the Bank's mortgages and denied that its borrowers Chopin and MCLP had the right to recover money that the "liquidating trustee" wrongfully paid to satisfy the Bank's loans. *In re Holywell Corp.*, ("Contract Rate"), 901 F.2d 931 (11th Cir. 1990), *cert. denied* 111 S.Ct. 713 (1991). Thus, this Court's common law Mootness Standard providing finality to a bankruptcy court's

orders, where there is no stay, effectively denied the debtors' right to appeal a money judgment granting the Bank an estimated $13 *million* in interest exceeding the amount provided for in the contractual documents. This Court concluded that the debtors' right of appeal and protection of the laws must be denied, quoting *Miami Center*, 838 F.2d at 1556, based upon "what the Bank bargained for, and received, as part of the reorganization plan."

Seventh. Still another panel of this Court, relying upon the *Miami Center's* Mootness Standard, in *Fred Stanton Smith, etc. v. Bank of New York, Miami Center Limited Partnership, et al.*, No. 88-0151-Civ-SMA (S.D. Fla., July 21, 1988), appeal *dismissed*, 923 F.2d 865 (11th Cir.), *cert. denied*, 111 S.Ct. 2259 (1991) ("Postpetition Interest Case"), sanctioned the trustee's conduct in allowing the Bank to take a credit against the Miami Center's purchase price of $27,050,115 in postpetition interest on its "undersecured" claim, 54 B.R. 41 (Bkrtcy. S.D. Fla., 1985), *Confirmation Order*, after the Bank had agreed to personally indemnify him for his actions, on the grounds that the plan provided for the payment of unmatured interest from the filing date to the closing of the Miami Center's sale.

Eighth. In another case, *Holywell Telecommunications Company and Holywell Leasing Company v. Bank of New York*, NO. 89-5955, January 9, 1991 (11th Cir), the same panel dismissed an appeal and allowed to stand the district court's conclusion that the "liquidating trustee" as the stockholder of HTC and HLC "obtained Holywell's

right to acquire the assets of HTC/HLC by either liquidating the two corporations or causing them to distribute a dividend to the Liquidating Trust." (S.D. Fla. May 24, 1989). Thus, this Court sanctioned conveyance of the title of the assets of HTC and HLC with a value of *$18,464,818* as of October 10, 1985, to the Bank *without* consideration and curing defaults in accordance with the requirements of 11 U.S.C. Section 365.

The present case concerns the question of whether a Court will enforce as binding a confirmed plan which does not comply with the applicable provisions of the bankruptcy statutes and will sanction the use of the contempt power to impose excessive fines to harass and deter an individual from discharging a fiduciary duty.

ARGUMENT

1. The Bank's Plan Is *Not* Binding Upon Theodore B. Gould As The "Law Of The Case" – A Confirmed Plan Which Does Not Compiy With The Applicable Provisions Of The Bankruptcy Code Should Not Be Enforced.

a. 11 U.S.C. Section 1129 provides that a court shall confirm a plan *only if* the enumerated requirements of subsection (a) have been satisfied, and the Notes of the Committee on the Judiciary, Senate Report No. 95-989, state, in relevant part, as follows:

> "Subsection (a) enumerates the requirement governing confirmation of a plan. *The court is required to confirm a plan if and only if all of the requirements are met.* (Emphasis added)

Paragraph (a) requires that the plan comply with the applicable provisions of chapter 11, such as sections 1122 and 1123, governing classification and contents of plan. (Emphasis added)

Paragraph (2) requires that *the proponent of the plan comply with the applicable provisions of chapter 11, such as section 1125 regarding disclosure* (Emphasis added)

Paragraph (3) requires that *the plan have been proposed in good faith,* and not by any means forbidden by law." (Emphasis added)

"Paragraph (5) is also derived from section 221 of chapter X [former section 621 of this title]. *It requires the plan to disclose the identity and affiliations of any individual proposed to serve, after confirmation, as a director, officer, or voting trustee of the reorganized debtor. The appointment* to or continuance in one of these offices by the individual *must be consistent with the interests* of creditors and equity security holders and with *public policy.*" (Emphasis added)

"Paragraph (10) states that, to be confirmed, the plan must provide that each holder of a claim under section 507 will receive property, as therein noted, of a value equal to the allowed amount of the claim. . . . (B) where a debtor's business is reorganized under chapter 11, *this provision requires that taxes entitled to priority* (including administrative claims or taxes) *must be paid in cash not later than 120 days after the plan is confirmed, unless the Secretary of the Treasury agrees* to other terms or kinds of payment. . . . " (Emphasis added)

"Paragraph (11) requires a determination regarding feasibility of the plan."

> "Subsection (d) provides that *the bankruptcy court may not confirm a plan of reorganization if its principal purpose is the avoidance of taxes. . . .* " (Emphasis added)

The Notes of the Committee on the Judiciary, House Report No. 95-595, provide, in relevant part, as follows:

> *"The court is not permitted to alter the terms of the plan. It must merely decide whether the plan complies with the requirements of section 1129(b).* If so, the plan is confirmed, *if not the plan is denied confirmation."* (Emphasis added)

> *"Subsection (d) requires the court to deny confirmation if the principal purpose of the plan is the avoidance of taxes* (through use of sections 346 and 1146, and *applicable provisions of State law or the Internal Revenue Code. . . .* " (Emphasis added)

The phrase "if and only if" means the plan must satisfy *each* of the enumerated requirements and cannot be confirmed if it does not satisfy *all* of the requirements of subsection (a).

The failure of the classification system of the Bank's plan to satisfy the requirements of Section 1122 was the basis for this Court's conclusion that the Bank's plan did *not* comply with Section 1129(a)(1), and thus, the bankruptcy court lacked authority to confirm such a plan, *In re Holywell Corp.*, 913 F.2d at 880.

It is undisputed that the Bank's plan did *not* comply with subsection (a)(2) since the Bank did *not* comply with the applicable provisions of Section 1125 regarding disclosure to provide "adequate information" that the plan made no provision for the payment of federal and state income taxes incurred during the bankruptcy court's

administration of the estate and arising from the capital gains related to the Miami Center's sale in accordance with the plan's provisions.[22]

The Trustee has conceded to the Supreme Court that "the plan did not deal with the payment of postconfirmation taxes, and the Bank's disclosure statement did not analyze the tax consequences of the proposed reorganization."[23] *Respondant* [sic] *Smith's Br.*, 3.

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[22] Bkrtcy. S.D. Fla., *Transcript*, February 11, 1988:

MR. GOULD: "Did you review and approve the adversary proceeding filed by your counsel in this particular case?

. . .

MR. SMITH: "Yes."

MR. GOULD: "In the adversary proceeding, your counsel has alleged that the Bank of New York did not disclose there was no provision made for the payment of the debtor's federal and state income tax liabilities; is that correct?"

MR. SMITH: "That's correct."

MR. GOULD: "As the Trustee, do you consider the Bank of New York's conduct to be a material act of omission?"

MR. SMITH: "Yes."

[23] The footnote to this statement that "the bankruptcy court found . . . that the debtors' plans had failed to disclose any tax liability arising from the sale of the Washington Properties or of Miami Center" is a *smoking gun*, disclosing Bankruptcy Judge Weaver's "common practice," App. *264a*, to engage in *ex parte* communication with the Trustee's attorney and abandon his duty as a judge to find the facts specially under F.R.C.P. Rule 52(a).

As previously explained, Bankruptcy Judge Weaver's decision announced orally, on April 11, 1988, concluded *only* that the Trustee was not responsible for the payment of income taxes related to the sale of the Washington Properties and the Miami Center. There was no testimony of witnesses or documentary evidence and the Trustee's Complaint did not make the *false* allegation that the debtors' plans failed to disclose the tax

It is also undisputed that the Bank's plan did not comply with subsection (a)(3), requiring that the plan have been proposed in good faith. This good faith requirement must be read *in pari materia* with subsection (d) which provides that the court will not confirm a plan if its principal purpose is the avoidance of taxes imposed by the applicable provisions of State law and the Internal Revenue Code. This Court found that the Bank's plan made "no express provision requiring the liquidating trustee to either file tax returns or pay income taxes," *Tax Case* at 1542, and the bankruptcy court held that the payment of income taxes would require a modification of the confirmed plan, stating "[a] modification would require the liquidating trustee to recover millions of dollars already paid to creditors for redistribution on a pro rata basis."

The Bank has conceded to the Supreme Court that the creation of the Miami Center Liquidating Trust and the appointment of the "liquidating trustee" was a scheme to avoid the payment of taxes and defeat the priority of the United States under Section 503 or 31 U.S.C. Section 3713.[24]

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liabilities which would arise from the sale of the Washington Properties and the Miami Center.

[24] "Having failed to raise its collection-based objections in a timely fashion, the IRS now seeks to collect the debtors' taxes from funds that the plan of reorganization explicitly reserves for other creditors. If this mode of collection is permitted, it will have extremely unsettling effects on the bankruptcy process. That process is one of negotiation and compromise; *the IRS should not be permitted to absent itself from the negotiating table and then demand a form of 'super-priority' payment after the plan has*

As we explained to the court below, subsection (a)(5) must be read *in pari materia* with Section 1123(a)(7) and provides, in relevant part *only*, for the manner of selection under a plan's provisions of a "voting trustee of the reorganized debtor" consistent with the requirements of "public policy." App. *176a*. Public policy precludes a court from confirming a plan and appointing a trustee for the purpose of engaging in conduct injurious to the State. App. *176a*. Nevertheless, the Bank stated in its Opposition Brief to granting certiorari that it would have been a breach of fiduciary duty for the trustee appointed under the provisions of the Bank's plan to pay income taxes incurred during the bankruptcy court's administration period.[25]

The principle of law embodied in the term "public policy" is that no person can lawfully do that which has a tendency to be injurious to the interests of the State, and the courts will *not* enforce contracts which are unlawful or have a mischievous tendency. *Bank of the United States v. Owens*, 27 U.S. 527, 538 (1829) ["Courts are instituted to carry into effect the laws of a country, how can they

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been confirmed. Creditors' votes to confirm a plan are premised on the belief that it provides a fixed sum of money to meet their claims." (Emphasis added) *Respondents' Brief*, p. 48.

[25] " . . . it would be inequitable to require an individual or entity to file returns and pay taxes *where the individual or entity lacks the authority to do so under a reorganization plan sanctioned by the bankruptcy court*. The result . . . would require the Liquidating Trustee to violate the terms of the trust agreement. . . . " (Emphasis added) *Brief In Opposition Of The Bank Of New York*, p. 10. Compare *King v. United States*, 379 U.S. at 338-339 (trustee personally liable for failing to seek amendment to plan to pay taxes).

become auxillary to the consummation of violations of law?"]

It is obvious that the Bank's plan does not comply with the requirement for the payment of taxes entitled to a priority defined in the exception to subsection (a)(10). Also, the Bank, as the plan's proponent, did *not* seek the Secretary of the Treasury's consent to use the assets of Holywell Corporation under the principles of substantive consolidation to pay claims against MCLP *prior* to paying Holywell's tax liabilities.[26]

The failure of the Bank's plan to provide for the payment of federal and state income taxes incurred during the bankruptcy court's administration period and arising from the Miami Center's sale in accordance with the plan's provisions precludes the conclusion that subsection (a)(11) was satisfied: the Feasibility Standard requires that a bankruptcy court may *not* confirm a plan without assuring itself that the Tax Collector will be paid. *United States v. Energy Resources Co.*, 110 S.Ct. 2139, 2142 (1990) ("The Code . . . requires the bankruptcy court to

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[26] In fact, the plan's "modified form" of substantive consolidation required the payment of Holywell's liabilities and a dividend distribution to its stockholder *prior* to the use of its assets to pay claims against other debtors. The United States and Virginia are creditors of Holywell Corporation. Florida is a creditor of the Miami Center Corporation and several other subsidiaries of Holywell Corporation engaged in business solely in the State of Florida. As of July 31, 1991, the "liquidating trustee" misappropriated *$18,569,441.31* of the cash of Holywell and its Virginia subsidiaries for the payment of claims against MCLP *without* first discharging the liabilities of the corporations.

assure itself that reorganization will succeed, [11 U.S.C.] Section 1129(a)(11), and therefore that the IRS, in all likelihood, will collect the tax debt owed.") The Feasibility Standard required the bankruptcy judge to determine "whether the things which are to be done after confirmation can be done as a practical matter under the facts," *In re Clarkston*, 767 F.2d 417, 420 (8th Cir. 1985), citing *In re Bergman*, 585 F.2d 1171, 1179 (2nd Cir. 1979), quoting *9 Collier On Bankruptcy* at 1139.[27]

b. As we have previously explained, the historical precedent of the Supreme Court precludes a bankruptcy court from exercising its authority to confirm a plan which does not satisfy the Fair and Equitable Standard. In *Protective Committee v. Anderson*, 390 U.S. 414, 435, 441 (1967), the Court held, in relevant part, as follows:

> "[A] plan of reorganization which is unfair to some persons may not be approved by the court even though the vast majority of creditors have approved it (footnote omitted)."

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[27] Although the bankruptcy court's order confirming the plan held that the Bank's claim was "undersecured" and that the Bank "faced a substantial loss," 54 B.R. at 41, 43, the "liquidating trustee" allowed the Bank to take postpetition interest of $27,050,115 on its "undersecured" claim as a credit against the purchase of MCLP's property and, as we previously explained, this Court affirmed the district court's conclusion that "the validity of the credit under Section 506(b) as a matter of law must remain unanswered" under the *Miami Center's* common law Mootness Standard on the grounds that the Bank's plan provided for payment of interest to the Miami Center's sale. Thus, the Bank's plan also did not comply with Section 506(b).

> " . . . a bankruptcy court is not to approve or confirm a plan of reorganization unless it is found to be 'fair and equitable'. This standard incorporates the *absolute priority doctrine* under which creditors and stockholders may participate only in accordance with their respective priorities. . . . [citation omitted] Since the determination of insolvency was not made in accordance with the proper standards of valuation, *neither the approval or the confirmation of the plan can stand.*" (Emphasis added)

It is clear that the Bank's attorneys perpetrated a fraud upon the bankruptcy court in the confirmation proceedings and this Court's dismissal of the debtors' appeal on the grounds of mootness was based upon having erroneously granted deference of the "clearly erroneous" standard of review to the bankruptcy court's adoption *in toto* of the Bank's proposed findings of fact and conclusions of law. However, all federal courts possess an inherent power that, *inter alia,*

> " . . . allows a federal court to vacate its own judgment upon proof that a fraud has been perpetrated upon the court. This 'historic power of equity to set aside fraudulently begotten judgments," *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245 (1944), is necessary to the integrity of the courts, for 'tampering with the administration of justice in [this] manner . . . involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public." *Id.* at 246.

In fact, this Court has held that the Bank's plan could *not* be confirmed because it discriminated unfairly with

respect to classes of impaired claims and the classification scheme violated the Miami Center Joint Venture's basic contractual priority rights. *MCJV*, 913 F.2d at 880.

c. The district court's reliance upon Art. IV, *Retention of Jurisdiction*, of the Bank's plan to grant authority to the bankruptcy court to retain jurisdiction over Theodore B. Gould's conduct and property *not* in the court's possession "in order to enter any order necessary or appropriate to enforce the plan" is clearly reversible error for the following reasons:

First. The bankruptcy court's statutory authority is limited to exercising control of the trustee's actions, as the entity appointed to carry out the plan.

Second. 28 U.S.C. Section 157 defines the jurisdiction of a bankruptcy judge. A bankruptcy court has authority to exercise *in rem* jurisdiction over the debtor's property *prior* to the confirmation of a plan and core proceedings include "matters concerning the administration of the estate," Section 157(b)(2)(A). As this Court has held, the "administration of the estate ceases upon confirmation of a plan of reorganization." *Tax Case*, 911 F.2d at 1545.

If the administration of the estate has ended as an effect of confirmation, then the bankruptcy court's jurisdiction *after* confirmation is limited to exercising authority to implement the plan in a manner complying with the bankruptcy statutes and applicable laws. *Reese v. Benson Hotel Corp.*, 149 F.2d 610, 611 (2nd Cir. 1945) [" . . . we have repeatedly held that reservation beyond what is requisite to effectuate a plan of reorganization is beyond the power of the reorganization court."]

2. The Fairness Standard Requires Specificity In The Determination Of Adequate Means For A Plan's Implementation And Income Earned *After* Confirmation Is Released From All Claims And Interests Of Creditors.

The standard for determination of the fairness of a reorganization plan requires " . . . a determination of what assets are subject to the payment of the respective claims," *Consolidated Rock Products Co. et al. v. DuBois*, 312 U.S. 510, 520 (1940) and 11 U.S.C. Section 1123(a)(5) requires that adequate means for the payment of claims be specifically enumerated. *Matter of Wood*, 47 B.R. 774 (Bkrtcy. W.D. Wis. 1985);[28] see also *Prince v. Clare*, 67 B.R. 270 (N.D. Ill. 1986); *Matter of Ford*, 61 B.R. 913, 917 (Bkrtcy. W.D. Wis. 1986); *In re Balogun*, 56 B.R. 117, 118 (Bkrtcy. M.D. Ala. 1985).

It is undisputed that a bankruptcy court has jurisdiction to adjudicate controversies relating to property of a debtor's estate over which it has actual or constructive possession. *Thompson v. Magnolia Co.*, 309 U.S. 478, 481 (1940). Thus, the first question is whether the bankruptcy court had jurisdiction over the property *after* administration of the estate ended and the second question is whether the "liquidating trustee" owned the concrete pumps.

The various courts of appeal have adopted the general rule that "the jurisdiction of the bankruptcy court

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[28] "A large number of implicit provisions can be read into any plan. Section 1123 requires some degree of specificity in plans including adequate means for the plan's implementation." *Wood*, 41 B.R. at 778.

over the property is generally said to *terminate* and does not follow it. . . . " App. *178a.*

The court held in *Wood* that since no provision was included in the plan restraining the sale of the estate's cows, and the creditors did not insist on a distribution of any proceeds from such a sale, the property was revested in the discharged debtor and was released from all claims and interests of creditors as an effect of confirmation.

In the "Tax Case" before the Supreme Court, the Bank has also conceded that "[c]onfirmation terminates the bankruptcy estate and revests in the reorganized debtor any assets not needed to pay creditors' claims." *Respondant's* [sic] *Br.,* 14.[29] The value or sale proceeds of the concrete pumps were *not* enumerated as property needed to pay the claims of creditors,[30] and the Trustee's

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[29] "The plan provided that Miami Center would be sold within 45 days of confirmation pursuant to a contract attached to the plan . . . ; that the proceeds of the sale and of the earlier sale of the Washington Properties would promptly be distributed to creditors as fixed in the plan . . . and that all remaining assets of the liquidating trust would then be returned to the reorganized debtors. . . . This residue was . . . to include stock owned by Holywell in 19 subsidiaries that had not filed for bankruptcy, as well as partnership and joint venture interests owned by Holywell and Gould individually. . . . " *Respondant's Br.,* 15-16.

[30] See Article IV, *Means For Execution Of The Plan,* of the Bank's Plan, App. *15a,* which states, in relevant part, as follows:

> "*Sale of Miami Center*
>
> The Plan would be implemented by a sale of Miami Center to BNY or its designee for a purchase price of $255,600,000 pursuant to a contract of sale substantially in the form of Exhibit A annexed hereto (the

attorney stipulated in the "Tax Case" that the Plan's Article IV, *Means For Execution Of The Plan*, specifically enumerated all the assets available for the payment of claims against the debtors' estates. App. *229a*.

"Contract of Sale"). Within 5 business days after the Effective Date, the Trustee and BNY or its designee would execute the Contract of Sale, which requires a closing of title within 45 days after the Effective Date. The purchase price would be paid and applied in the following manner:

(a) BNY would receive a credit for the amount of the BNY Debt plus expenses to the Miami Center Closing Date, which, assuming a closing date of June 1, 1985, and no change in BNY's Prime Rate, would be $236,587,618.

(b) BNY would pay the balance of the purchase price in cash (approximately $19,012,382) to the Trustee. . . .

Upon the passing of title of Miami Center to BNY, BNY's lien and security interest in the Washington Proceeds and the other collateral shall be limited to the BNY-Holywell Loan, and the balance of the Washington Proceeds will be available for distribution to Creditors."

Vance Salter, Esq., attorney for the Bank of New York, specified the means available for the Plan's implementation on May 31, 1985, in a hearing related to the availability of funds for payment of the Miami Center Joint Venture's claim, as follows:

" . . . We are offering to pay $19 million, the difference between the adjudicated amount of our lien . . . and to release our collateral $31 million net of some expenses [i.e., the court authorized 'super-priority' loans], which your Honor has approved previously, maybe $28 million remaining now. So *we are offering to release in essence, and put to the disposition of the creditors for the payment of liens, taxes, city and county taxes, the IRS, all of the creditors in these estates $47 million.*" (Emphasis added)

In fact, the district court granted judicial notice to the trustee's testimony on examination that he did not have possession and exercise "control of any other property other than money of any of the consolidated debtors." App. *221a*. The trustee did *not* have possession or control of the concrete pumps. Thus, the court below should have held that the doctrine of equitable estoppel precluded the "liquidating trustee" from asserting any rights to the proceeds of the sale of the concrete pumps.

Furthermore, the district court's contempt order is based on a fundamental misunderstanding of the law in concluding that "the question of whether the trust may pay taxes is not relevant to the issue of ownership of the concrete pumps," and thus, the court erred in premising its certification of the bankruptcy court's order on the finding that "Mr. Gould sold an asset of the Miami Center Liquidating Trust and pocketed the proceeds without the consent of the Liquidating Trustee and in direct violation of a court order." App. *234a*. It is a fundamental principle that "[f]or federal income tax purposes, gain or loss from the sale or use of property is attributable to the ower [sic] of the property." *Commissioner v. Bollinger*, 485 U.S. 340, 344 (1988), *accord Blair v. Commissioner*, 300 U.S. 5, 12 (1937). If the "liquidating trustee" owned the concrete pumps and was entitled to receive the sale proceeds, then he was a fiduciary acting on behalf of an estate of Theodore B. Gould required to file tax returns on behalf of such fiduciary estate in accordance with 26 U.S.C. Section

6012(b)(4),[31] and thus, this Court's opinion in the "Tax Case" was an error.

If the Supreme Court reverses this Court's conclusion that "the liquidating trustee's non-discretionary duties of distributing the trust property in accordance with the Plan make[s] him similar to a disbursing agent rather than an assignee or fiduciary," *Tax Case*, 911 F.2d at 1546, and thus, having been assigned title to the debtors' property is responsible for the payment of taxes, then the Bank's plan cannot be fully implemented and has failed. Furthermore, the trustee must be discharged and held personally liable for his failure to satisfy his duties as a fiduciary to the United States. *King*, 379 U.S. 329 at 338-339.

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[31] *See, e.g., Williams v. Commissioner*, 44 T.C. 673, 676 (1965) (assignee for the benefit of creditors under court supervision is treated as the "receiver" of an "estate" and is a "trustee for all the creditors"; *Mickelson v. Barnet*, 460 N.E.2d 566, 570-71 (Mass. 1984) (effect of transfer for benefit of specified creditors was to convey assets in trust); *In re Mader's Store for Men, Inc.*, 254 N.W.2d 171, 177 (Wis. 1977) ("estate" created by assignment for benefit of creditors); *see also* 6A C.J.S. *Assignments for Benefit of Creditors* Section 72 (1975) ("[t]he creditors are the beneficiaries of a trust created by the assignment"); *id* Section 89 (assignee for the benefit of creditors has "the duty to manage, protect and conserve the estate for the benefit of both the assignor and the creditors").

3. The Bankruptcy Court Lacked Power To Appoint A Trustee As An Assignee For The Benefit Of Creditors *After* Confirmation Under The Provisions Of The Bank's Plan Without Satisfying The Statutory Requirements Of Title 11.

It is a fundamental rule that the judgments of federal courts must be based upon jurisdiction conveyed by statute. See *Finley v. United States,* 490 U.S. 545 (1989), quoting *Ex Parte Bollman,* 4 Cranch 75, 93 (1807). ("Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction.") Thus, the Supreme Court has consistently held the rule of statute paramount, stating that a court " . . . cannot go beyond that statute and assert an authority which they may not be invested by it, or which may be clearly denied to them." *Cary v. Curtis,* 3 How. 236, 245 (1845). A bankruptcy court's equitable powers "can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v. Ahlers,* 107 S.Ct. 3227 (1987); *accord Guerin v. Weil, Gotshal & Manges,* 205 F.2d 302, 304 (2nd Cir. 1953).

This Court has held that the "liquidatinq trustee is *not* a trustee under title 11," *Tax Case,* 911 F.2d at 1546. Thus, the bankruptcy court's authority to appoint the "liquidating trustee" as a receiver or an administrator of the estate of Theodore B. Gould is the threshhold question in this appeal, and requires a determination of a strictly jurisdictional fact, "the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity," *Noble v. Union River Logging Railway Co.,* 147 U.S. 165, 173 (1892),

citing Chief Justice Marshall's opinion in *Griffith v. Frazier*, 8 Cranch 9, 23 (1814), that if a court appoints an administrator of an estate of a living person, or there is an executor capable of acting, then the judgment of the court fails for want of jurisdiction, the proceeding is a *nullity*, and its invalidity may be shown in a *collateral* proceeding. In such a case, the Supreme Court has held that the court's appointment is void *ab initio* and all of the acts of the trustee are also void. *Griffith*, 8 Cranch at 27.

First. 11 U.S.C. Section 105(b) *prohibits* appointment of a receiver "under any circumstances" in a case under title 11. *H.R. Rep. 595, 95th Cong., 1st Sess., 232-34 (1977).* The "liquidating trustee" is a receiver. The term "receiver" has been defined as "embracing any person acting as [an] agent or depository of funds for a court." *Spring Valley Water Co. v. San Francisco*, 246 U.S. 391, 395 (1918). Referring to the individual appointed trustee of the Miami Center Liquidating Trust as a "liquidating trustee," instead of as a "receiver," is simply a means of avoiding Section 105(b)'s statutory prohibition upon the equitable powers of a bankruptcy court.

Second. Section 337(1), 11 U.S.C. Section 737(1) (1976), providing for appointment of a "disbursing agent" to distribute the deposit for payment of claims was *not* adopted in the Bankruptcy Reform Act of 1978.

Third. A "trustee in a case under title 11" may be appointed *only* under sections 701, 702, and 703 in Chapter 7; sections 1104 and 1163 in Chapter 11; and section 1302 in Chapter 13.

In the "Tax Case," the Respondants [sic] have both taken the position before the Supreme Court that the

phrase "trustee in a case under title 11" is a term of art and applies only to a "representative of the estate," 11 U.S.C. Section 323, appointed specifically under one of these provisions of title 11 and satisfying the requirements for eligibility of Section 321 and qualifications of Section 322. Both Respondants [sic] have taken the position that the administration of the debtor's estate of Theodore B. Gould created under Section 541 ended as an effect of confirmation, and "no 'estate' is involved here: petitioner Gould is a very much alive discharged debtor." *Respondent Smith's Br.*, 19.

Fourth. 11 U.S.C. Section 1123(a)(7) does *not* authorize a plan's proponent to propose the appointment of a trustee, vested with possession of the property of a corporation or an individual, and assigned title to the property of a corporation or an individual's estate, *without* satisfying the statutory requirements of sections 701, 702, 703, 1104, and 1302 – it is limited to "the manner of selection" of any officer, director or a trustee. The intent of Congress in limiting the authority of a court in a bankruptcy case to appoint a trustee is also illustrated by the various provisions specifically defining the duties of a trustee lawfully appointed by the court in a "case under title 11," which require such a person to file income tax returns on behalf of the debtor and pay the taxes. See Section 704(8); Section 1106(a)(6); and Section 1165.

Fifth. 11 U.S.C. Section 1129(a)(5) clarifies the intent of section 1123(a)(7) with respect to the appointment of a "trustee under the plan" – the reference is to the appointment of a "voting trustee." Section 1123(a)(7) does not provide for appointment of a trustee or receiver *after* confirmation vested with the power to exercise absolute

control of the property of an individual, and receive income as a receiver on behalf of such an individual.

The Bank, as the plan's proponent, could have requested the appointment of a trustee in the interests of creditors under the "Best Interest Standard", Section 1104(a)(2), "at any time after the commencement of the case but before the confirmation of a plan," subject to the limitations imposed upon the court's power to appoint a receiver in a case under title 11. A trustee appointed for the benefit of creditors under Section 1104 would have been responsible for filing a plan under section 1121, filing income tax returns under Section 1106(a)(6), and after confirmation of the plan filing such reports as are necessary concerning the plan's implementation.

If we accept this Court's conclusion that "the liquidating trustee is not a trustee under title 11," *911 F.2d at 1546*, and also the trustee's argument that he is *not* a fiduciary and could not be appointed as an administrator of the estate of a living person because Theodore B. Gould was discharged as an effect of confirmation and the bankruptcy court's administration of the estate ended, *supra at 1545*, then *Griffith* requires treating his acts as void *ab initio* and a nullity.

4. The District Court's Affirmance Of The Bankruptcy Court's Order Of Contempt And The Imposition Of Punitive Sanctions Of A Daily Fine Of $1,000 Was A Violation Of The Due Process Clause And The Excessive Fines Clause Of The Constitution.

The punitive fines of $1,000 per day imposed by the courts below are an abuse of the judicial process and a

violation of the Excess Fines Clause. As the Supreme Court explained in *United States v. United Mineworkers*, 330 U.S. 258, 303 (1946):

> "Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained. *Gompers v. Bucks Stove & Range Co., supra,* at 448, 449. Where compensation is intended, a fine is imposed, payable to the complainant. Such fine must of course be based upon evidence of complainant's actual loss, and his right, as a civil litigant, to the compensatory fine is dependent upon the outcome of the basic controversy.
>
> But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. *It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result desired.*
>
> It is a corollary of the above principles that a court which has returned a conviction for contempt must, *in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant.*" (Emphasis added)

In this case, the "liquidating trustee" is in possession of *all* of Theodore B. Gould's assets and has received *$13,872,451* in postconfirmation income, *without* having paid one cent in federal or state income taxes.

The *United Mineworkers* standard has been applied by this Court in vacating the imposition of a fine of $1,000 per day as a sanction payable to a "liquidating trustee" in the case of *In re Chase & Sanborn Corp.*, 872 F.2d 397 (11th Cir. 1989):

> "Civil contempt sanctions may be imposed for either or both of two distinct purposes, to coerce compliance with a court order, and to compensate the complainant for actual losses sustained by him as a result of the defendant's contumacy." *872 F.2d at 400.*

As in the present case, the district court did not explain in *Chase & Sanborn* the factors considered in imposing a sanction of $1,000 per day, and this Court reversed:

> " . . . *no evidence or explanation, other than the amount of the final judgment, exists to demonstrate why a daily fine of $1,000 was imposed.* The trustee had the burden of proof to provide the court with the basic evidentiary facts to formulate a realistic sanction to which the defendants could respond [citations omitted]. *Since we cannot determine what factors the court considered in imposing the sanction, it must be vacated. . . .* " (Emphasis added)

Under *Chase & Sanborn*, a punitive sanction of $1,000 per day must be vacated for it has been made without a proper evidentiary basis. In addition, under *United States v. Rylander*, 460 U.S. 752 (1983), the "liquidating trustee" should have addressed the evidence of the defendant's inability to comply with the district court's order, since a present inability to comply is a complete defense to civil contempt and the past ability to comply is not *res judicata*

as to a continuing ability to comply. See *Donovan v. Mazzola*, 761 F.2d 1411, 1417 (9th Cir. 1985).

As the Supreme Court held in *Rylander*, the ability to comply is a crucial inquiry for a court's decision concerning coercive civil contempt orders, and the court is required to weigh all the evidence properly before it determines whether or not there is actually a present ability to obey and whether failure to do so constitutes deliberate defiance or wilfull disobedience which a coercive sanction will remedy. *See Maggio v. Zeitz*, 333 U.S. 56, 76 (1948).

The threat of the courts below to impose punishment by incarceration is a violation of the Due Process Clause and a further abuse of the judicial process which must be considered in terms of the following applicable standard defined in the seminal case of *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911):

> "[W]hether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. *If it is for civil contempt the punishment is remedial, and for the benefit of the complainant.* But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison.

> But *imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character.* Imprisonment in such cases is *not inflicted as a punishment,* but is intended to be remedial by coercing the defendant to do what he had refused to do. *The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order."* (Emphasis added)

As the Supreme Court also explained in *Gompers,*

> "Imprisonment cannot undo or remedy what has been done nor afford any compensation for the pecuniary injury caused by the disobedience. . . . Such imprisonment operates, not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience."

Thus, the Court concluded such imprisonment for an act which cannot be undone is solely punitive in character. *221 U.S. at 443.*

The applicable standard for punishment by imprisonment must be construed in accordance with the requirements of due process of law defined by the Second Circuit Court of Appeals in *Matter of Dickinson,* 763 F.2d 84, 87 (2nd Cir. 1985), citing various opinions of the United States Supreme Court:

> "The primary purpose of the imposition of a sanction for civil contempt is to coerce the contemnor into future compliance and to remedy past non-compliance, rather than to punish him. *Shillitani v. United States,* 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.Ed.2d 622 (1966); *Vuitton et Fils S.A. v. Carousel Handbags,* 592 F.2d 126, 130

> (2d Cir. 1979). Since 'due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed,' *Jackson v. Indiana*, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed. 2d 435 (1972), *once a contemnor establishes that there is no 'substantial likelihood' that continued confinement would accomplish its coercive purpose, the confinement becomes punitive in nature, at which point due process requires its termination.*" (Emphasis added)

See also *United States v. City of Yonkers*, 856 F.2d 644, 659 (2nd Cir. 1988) [" . . . the law of contempt exerts some outer limits on the normally 'wide discretion' of a district court to fashion appropriate remedies to secure compliance with its lawful orders."]

Similarly, Chief Justice Rehnquist delivered the Supreme Court's opinion in *Spallone v. The United States*, 110 S.Ct. 625, 633 (1990), citing the Second Circuit's opinion in *Yonkers*, 856 F.2d at 454 (quoting *Anderson v. Dunn*, 6 Wheat 204, 231 (1821)) and stated, in relevant part, as follows:

> " . . . the use of the contempt power places a[n] . . . limitation on a district court's discretion, for as the Court of Appeals recognized, 'in selecting contempt sanctions a court is obliged to use the "least possible power adequate to the end proposed." ' "

In the present case, imprisonment would not be remedial or a vindication of the Court's authority, since it is *not* possible to perform the act required to turn over the sale proceeds of $66,000. Furthermore, Theodore B. Gould has *not* made any representations before the bankruptcy

judge or the district court that the proceeds derived from the sale of the concrete pumps would be turned over to the "liquidating trustee." Thus, no misrepresentations of the Appellant's position were made in the presence of the bankruptcy judge. [See Bkrtcy. S.D. Fla., *Transcript*, July 27, 1989, pp. 58-72]

No reasonable person could avoid the conclusion that the only purpose of these contempt proceedings was to *harass*[32] Theodore B. Gould, since a fine of $1,000 per day or imprisonment as a punitive sanction would be a violation of the *Due Process Clause* of the Fifth Amendment and the *Excessive Fines Clause* of the Eighth Amendment in the present case. See *Yonkers*, 856 F.2d at 459 ["Both clauses apply to sanctions imposed to punish past conduct, not to sanctions imposed to secure prospective compliance."]

For the foregoing reasons, the order of contempt of the bankruptcy court and the district court's order

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[32] Mr. Stettin's Motion For Contempt, filed in the bankruptcy court, alleged that Theodore B. Gould breached his "contractual responsibility" to the Trustee and engaged in a "fraudulent conveyance" in the *after* confirmation sale of the concrete pumps and related equipment. However, *no hearing was held before the bankruptcy judge in accordance with 28 U.S.C. Section 158(b)(2)(H) to determine whether the sale was a fraudulent conveyance.* Instead, Mr. Stettin filed his contempt motion and the bankruptcy court's "Order Setting Contempt Hearing," drafted by Mr. Stettin, stated, in relevant part, as follows:

> "The essential facts constituting the alleged contempt charge are contained in the motion and are adopted herein."

certifying that Theodore B. Gould is in civil contempt should be *vacated* and *reversed*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Appellant's Initial Brief was sent by regular United States mail on November 1, 1991, to:

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APPENDIX B

11 U.S.C. § 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is –

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date –

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include –

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor;

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case;

(3) any eligibility of the debtor to participate in programs authorized under the Higher Education Act of 1965 (20 U.S.C. 1001 et seq.; 42 U.S.C. 2751 et seq.), or any accreditation status or State licensure of the debtor as an educational institution;

(4) any interest of the debtor in liquid or gaseous hydrocarbons to the extent that –

(A)(i) the debtor has transferred or has agreed to transfer such interest pursuant to a farmout agreement or any written agreement directly related to a farmout agreement; and

(ii) but for the operation of this paragraph, the estate could include the interest referred to in

26 U.S.C. § 6012. Persons required to make returns of income

(a) General rule. – Returns with respect to income taxes under subtitle A shall be made by the following:

* * *

(b) Returns made by fiduciaries and receivers. –

* * *

(3) Receivers, trustees and assignees for corporations. – In case where a receiver, trustee in a case under title 11 of the United States Code, or assignee, by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such receiver, trustee, or assignee shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

(4) Returns of estates and trusts. – Returns of an estate, a trust, or an estate of an

individual under chapter 7 or 11 of title 11 of the United States Code shall be made by the fiduciary thereof.

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28 U.S.C. § 1254. Courts of appeals; certiorari; certified question

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

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